(17,875.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1901.

No. 136.

WILLIAM B. DINSMORE AND C. GRAY DINSMORE, AND WILLIAM B. DINSMORE, C. GRAY DINSMORE, AND DUMONT CLARKE, AS EXECUTORS AND TRUSTEES UNDER THE WILL OF WILLIAM B. DINSMORE, DECEASED, PETITIONERS,

vs.

THE SOUTHERN EXPRESS COMPANY; L. N. TRAMMELL, THOMAS C. CRENSHAW, JR., AND SPENCER R. ATKINSON, COMPOSING THE RAILROAD COMMISSION OF THE STATE OF GEORGIA, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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a

Caption.

UNITED STATES OF AMERICA,
Fifth Judicial Circuit.

Pleas and proceedings had and done at a regular term of the United States circuit court of appeals for the fifth judicial circuit, begun on the third Monday of November, 1899, and held in the court-room of said court in the city of New Orleans.

Before the Honorable Don A. Pardee, United States circuit judge for the fifth judicial circuit; the Honorable David D. Shelby, United States circuit judge for the fifth judicial circuit, and the Honorable T. S. Maxey, United States district judge for the western district of Texas.

L. N. TRAMMELL ET AL., Railroad Commissioners of the State of Georgia, Appellants,
vs.
WILLIAM B. DINSMORE ET AL, Appellees.

WILLIAM B. DINSMORE ET AL., Cross-appellants,
vs.
THE SOUTHERN EXPRESS COMPANY, L. N. TRAMMELL, ET AL., Railroad Commissioners of the State of Georgia, Cross-appellees.

Be it remembered that heretofore, to wit, on the 17th day of April, 1899, a transcript of the record from the circuit court of the United States for the southern district of Georgia was filed in the office of the clerk of the United States circuit court of appeals for the fifth circuit in the words and figures following, to wit:

1

Bill of Complaint.

WILLIAM B. DINSMORE ET AL.
vs.
THE SOUTHERN EXPRESS COMPANY. } In Equity. No. 29.

UNITED STATES OF AMERICA,
Southern District of Georgia, Northeastern Division.

To the fifth circuit court of the United States for the northeastern division of the southern district of Georgia:

William B. Dinsmore, of the city of New York and a citizen of the State of New York; C. Gray Dinsmore, of the city of New York and a citizen of the State of New York, in proper person, and the said William B. Dinsmore and C. Gray Dinsmore and Dumont Clarke, all of the city of New York and citizens of the State of New York, as executors of and trustees under the will of William B. Dinsmore, deceased, late of the State of New York, and who produce here to the court their letters testamentary, ready to be shown,

bring this their bill of complaint in behalf of themselves and all other shareholders who are similarly situated and who shall be entitled to avail themselves of the benefits of this suit against "The Southern Express Company," a corporation created by and existing under and by virtue of the laws of the State of Georgia, located and having its principal office for the transaction of business in the city of Augusta, in the northeastern division of the southern district of Georgia; against Leander N. Trammell, of Marietta, and a citizen of the State of Georgia; Thomas C. Crenshaw, of Cartersville, and a citizen of the State of Georgia; and Spencer R. Atkinson, of Atlanta, and a citizen of the State of Georgia, composing the railroad commission of the State of Georgia, and against Joseph M. Terrell, of Greenville, and a citizen of the State of Georgia, as attorney general of the said State, the official residences of the said Trammell, Crenshaw, Atkinson, and Terrell being at Atlanta, in the northern division of the northern district of Georgia:

And thereupon your orators complain and say as follows:

First. Your orators show that the defendant, "The Southern Express Company," is a corporation originally incorporated July 5, 1861, for the space of fourteen years, to carry on the business of express forwarding, whose corporate existence was continued May 14, 1875, for a like term of fourteen years, and which company was, by act of the General Assembly of Georgia, approved December 21, 1886, P. L., 207, reincorporated, and all the rights, privileges,
2 and franchises, then possessed and enjoyed by the corporation continued of force, and the then corporators, with their associates, then existing as a body politic and corporate, declared to be incorporated under the said name of "The Southern Express Company" for the term of thirty years. This act enacts, in section 8, that the corporation is created for the purpose and object of enabling the aforesaid incorporators, their associates and successors, by the aforesaid corporate name, to engage in and carry on, in the State of Georgia, and in any and all of the States and Territories of the United States and in foreign countries where permitted, the business of carrying, transporting and forwarding, by railroad, steamboats, ships, canals, stages, and other means of transportation, goods, wares, merchandise, money, bills, notes, bullion, packages, parcels, and movable valuables of any description for delivery, collection, exchange, or otherwise over and upon such lines and routes as they may from time to time establish, and between geographical points, places or stations at which they may from time to time establish and continue agencies; and the said corporation was thereby invested with the powers necessary and proper for the said purpose, as well as the powers incident and appropriate to express carriers, and especially with full power to give such security, in the nature of a general transportation bond, as may be required by the laws of the United States and the regulations passed in relation thereto for the transportation and delivery of dutiable merchandise and other property in bonds from port to port in the United States. Reference is hereby prayed to said acts as if a duly authenticated copy thereof was annexed as an exhibit hereto.

Second. That by the fourth section of said legislative act it was enacted that the corporation thereby created shall issue to its members certificates or shares representing the interest owned by such member in the corporation in such form as it may be deemed expedient; that the business of the said express company is that of a common carrier for hire, and as such it has no income nor property nor money that is not necessary and in use in its business; that its income arises from the hire it receives or charges it makes in doing the transportation of express business by carrying quickly money, goods, wares, merchandise, and personal property, such carriage being made by the express company and its agents from points, first, within the State of Georgia, as from Atlanta to Augusta, or from Savannah to Atlanta; second, from points in the State of Georgia to points without the State, as from Augusta, Georgia, to Columbia, South Carolina, or Richmond, Virginia, or Nashville, Tennessee, and so on; and, third, from point to point wholly without the State of Georgia, as from Washington, District of Columbia, to Rich-
3 mond, Virginia, or New Orleans, Louisiana, or Memphis, Tennessee, and so on, and for which it issues through bills of lading in each case; that in order to carry quickly goods entrusted to it the said Southern Express Company uses the trains of the various railroads in the Southern States; that in this way it comes in contact with other express companies and transportation agencies, with whom it has connections and contracts, and exchanges business; that in all such cases only such rates of freight or charges for carriage are made as are reasonable and just for the service rendered and as permitted by law; that in order to do its part of this public service and to facilitate the quick despatch of any such business and commerce intrusted to it in its territory, to wit, in the States of Virginia, North Carolina, South Carolina, Georgia, Florida, Alabama, Mississippi, Louisiana, Texas, Tennessee, Kentucky and elsewhere, the said The Southern Express Company owns and its capital is invested in a large amount of personal property, such as delivery wagons, horses, houses, safes, office furniture, etc., which is of large value, and also money, undivided income, arising from its business, which is due to and held by it and its connecting express companies to answer for all wages, salaries of many employés, all losses, mistakes, and obligations incurred in carrying on the business aforesaid and payments to railroad companies for transportation over them.

Third. That in and by the said legislative act of December 21, 1886, it is, among other things, enacted that the rights, privileges, and powers then possessed and enjoyed and continued of force are to be exercised by the board of directors, who are to make rules, regulations, by-laws, and ordinances for the control, direction, management, and operation of their affairs and business not inconsistent with the laws of the State of Georgia and of the United States; that your orators are informed and verily believe that Henry B. Plant, Michael J. O'Brien, Morton F. Plant, and Henry Sanford are the directors of the said defendant express company, duly elected as such, and are now acting in that capacity and managing and conducting

all and singular the stock, property, affairs, and concerns of the said defendant express company.

Fourth. That your orators are citizens of the State of New York and residents of the city of New York; that upon the reincorporation of the said The Southern Express Company under the said legislative act they became the owners and holders of the shares now standing in their names on the books of the company, namely, William B. Dinsmore, 100 shares; C. Gray Dinsmore, 100 shares; estate of William B. Dinsmore, 800 shares; the approximate actual value of which shares is fifty thousand dollars ($50,000) or
4 other large sum; that the aggregate shares of the said express company outstanding amount to fifty thousand and are divided among a large number of different persons, who as such shareholders constitute a large body, and this suit is for an object common to them all. Your orators therefore bring it in their name in their behalf as holders of shares of interest in the said express company and as representatives and on behalf of such other shareholders similarly situated and interested as may choose to intervene and become parties hereto.

Fifth. Your orators further show that on the 13th day of June, 1898, there was approved an act of Congress of the United States entitled "An act to provide ways and means to meet war expenditures, and for other purposes," section 6 of which act requires that on and after the "first day of July, eighteen hundred and ninety-eight, there shall be levied, collected, and paid, for and in respect of the several bonds, debentures, or certificates of stock, and of indebtedness and other documents, instruments, matters, and things mentioned and described in Schedule A of this act, or for or in respect of the vellum, parchment, or other paper upon which such instruments, matters, or things, or any of them, shall be written or printed by any person or persons or party who shall make, sign, or issue the same, or for whose use or benefit the same shall be made, signed, or issued, the several taxes or sums of money set down in figures against the same, respectively, or otherwise specified or set forth in the said schedule." And in Schedule A, attached to the twenty-fifth section of the said act, appears the language, as follows: "Express and freight. It shall be the duty of every railroad or steamboat company, carrier, express company, or corporation, or person, whose occupation is to act as such, to issue to the shipper or consignor, or his agent, or the person from whom any goods are accepted for transportation, a bill of lading, manifest, or other evidence of receipt and forwarding for each shipment received for carriage and transportation, whether in bulk or in boxes, bales, packages, bundles, or not so enclosed or included; and there shall be duly attached and cancelled as in this act provided to each of such bills of lading, manifests, or other memorandum, and to each duplicate thereof, a stamp of the value of one cent. Any failure to issue such a bill of lading, manifest, or other memorandum as therein provided shall subject such railroad, or steamboat company, carrier, express company, or corporation or person, to a penalty of fifty dollars for each offense, and no such bill of lading, manifest or other memorandum

shall be used in evidence unless it shall be duly stamped as aforesaid."

Sixth. That after the approval of the said act of Congress, June 13, 1898, and when it became operative, the said Southern Express Company asked and demanded the production by its customers of the stamp required to be attached under the provisions of the said act at the issuing of its receipts or bills of lading, said express company insisting that it should not carry any package or issue its receipt therefor until the sender or shipper furnished the necessary governmental stamp therefor, as required by said act.

Seventh. That certain citizens of Georgia refused to furnish the stamps to be attached to the receipts or bills of lading or to pay for the same if furnished by the express company, and thereupon complained to the railroad commission of the State of Georgia, to wit, the said Trammell, Crenshaw, and Atkinson, who on July 11, 1898, issued an order as follows:

"It being represented to the railroad commission of Georgia that the Southern Express Company, a corporation engaged as an express company within this State in the business of a common carrier of goods and merchandise for hire, since the passage by the Federal Congress of an act, approved June 13, 1898, entitled 'An act to provide ways and means to meet war expenditures, and for other purposes,' has exacted and continues to exact from shippers as a condition precedent to forwarding any goods tendered to it for transportation between points within this State the payment of a special tax upon such shipments imposed by said act, thus indirectly increasing the cost of transportation beyond the rate fixed therefor by this commission, it is

"Ordered that the Southern Express Company do appear before this commission on the 18th day of July, 1898, then and there to show cause, if any it can, why it should not be held to have violated the rules and regulations of this commission by the exactions or overcharges, as aforesaid, and why suit should not be instituted against it in every case of such overcharges for the recovery of the penalty provided by law for such illegal act."

Cause was shown respectfully denying all jurisdiction in the premises on the part of the said commission, who, on August 2, 1898, ordered and directed the said stamp tax to be furnished, attached, cancelled, and paid by the said Southern Express Company alone, and not by the shippers, in whole or in part.

Eighth. That by paragraph 1, section 2, article IV of the Constitution of Georgia, of December 21, 1877, section 5797 of the Civil Code, it is ordained that the power and authority of regulating railroad freights and passenger tariffs, preventing unjust discriminations, and requiring reasonable and just rates of freight and passenger tariff were thereby conferred upon the General Assembly, whose duty it shall be to pass laws, from time to time, to regulate
6 freight and passenger tariffs, to prohibit unjust discriminations on the various railroads of the State, and prohibit said roads from charging other than just and reasonable rates,

and enforce the same by adequate penalties; that, acting under this constitutional provision, the General Assembly of the State of Georgia passed an act on October 14, 1879, to carry the same into effect, which was enlarged by the acts of December 18, 1890, October 16, 1891, August 31, 1891, and October 17, 1891, which said acts now comprise sections 2185 to 2217 of the Civil Code of the State of Georgia, to which express reference is hereby made as if set out herein; that by another act approved October 21, 1891, the General Assembly passed an act extending the powers of the railroad commissioners so as to give them power and authority to regulate charges for express companies for transportation, and to apply the powers given the said commissioners by law over railroad companies to all companies or persons owning, controlling, or operating a line or lines of express, and to make the penalties prescribed against railroads for violating the commissioners' rules apply to the companies or persons therein named whose line or lines is or are wholly or in part in the State, and for other purposes, the enacting part of which act is now section 2217 of the Civil Code of Georgia; that section 2 of the said act which is now 2218 of the Civil Code of Georgia, enacts that the powers of the commissioners to regulate charges for corporations, companies, and persons herein referred to shall apply only to charges by express for the transportation from one point to another in the State of Georgia.

Ninth. That, pursuant to the authority delegated to them, the railroad commissioners of Georgia fixed and prescribed rules, tariffs, and classifications governing express companies plying between points within the State of Georgia and submitted the same from time to time to the executive of the said State. To these, as they last appear in the twenty-fifth report, submitted October 15, 1897, and published and distributed throughout the State, complainants refer, praying to be excused from annexing a copy hereto on account of the voluminous character and details thereof.

Tenth. That the said Southern Express Company from the date of the passage of the said legislative act, October 21, 1891, have conformed to the rules, orders, and tariffs so adopted by the railroad commission of Georgia, and were continuing to do so when said act of Congress of June 13, 1898, became operative; that the penalty fixed by the said legislative acts of the State of Georgia for violating any order or rule or regulation of the railroad commission of the State of Georgia is not less than one thousand dollars ($1,000) nor more than five thousand dollars ($5,000) for each offense, to be fixed by the presiding judge in a suit where action is brought
7 against the company, which suits are to be brought by the attorney general of the State when directed by the said railroad commission.

Eleventh. That your orators are informed and believe that the payment of the tax imposed by the said war-revenue law of 1898, as required by the said order of the said railroad commission, will aggregate to the Southern Express Company in the State of Georgia annually the sum of forty-two thousand dollars ($42,000) or other large sum, and complainants aver that the said railroad commission

were without any authority under the constitution and legislative acts of the State of Georgia, or under the said act of Congress approved June 13, 1898, to require the payment of the said stamp tax upon and before issuing its receipts and bills of lading; complainants averring, also, that the express company has to make its own arrangements with the railroads for the carrying of its freight on passenger trains; that the railroads cannot be compelled to do this for the express company, and there is no prescribed limit to their charges against the Southern Express Company, as there is no charges made against the public; that the contracts of the express company with the railroad companies are matters of negotiation, and the average charge of the railroad is 50 per cent. of the express company's gross receipts; that it costs the express company 43 per cent. of its receipts to do its business, and this, added to the average 50 per cent. which must be paid to the railroads, makes the total cost to the express company 93 per cent. of its receipts. A considerable express business is done at a charge of 10 cents per package, and a very large proportion of its intrastate business is done at a charge of 25 cents per package. Take 93 per cent. from these charges and there is left a margin of seven-tenths of a cent on the 10-cent packages and one three-quarters of a cent on the 25-cent packages. If the express company is compelled to pay one cent each on the receipts, it loses three-tenths of a cent on every 10-cent package and makes only three-quarters of a cent on the 25-cent packages. This would materially reduce the very moderate profit of the business, and will so reduce the income of the company as to lessen any dividends payable to its shareholders, like complainants. That under section nine of the act of the General Assembly of the State of Georgia, approved December 24, 1896, Public Laws 28—to levy and collect a tax for the support of the State government for the years 1897 and 1898—all persons or companies doing an express business and charging the public therefor in the State of Georgia were required to "pay 2½ per centum on their gross receipts," and all persons or the superintendent or general agent of each express company were required to make a quarterly return under oath, in the form therein prescribed, under a
8 penalty of indictment, conviction, and punishment, pursuant to section 1039 of volume III of the Code of 1895, and a failure to pay the tax will subject such corporation to a forfeiture of its charter; that under the provisions of this act, in the imposition of this tax and the enforcement thereof, no deduction will be allowed for the expense the company is subjected to in complying with the said order of the railroad commission and in making payment itself of the stamp tax imposed by the said revenue act of Congress. In other words, the corporation will be paying a tax to the State upon the entire aggregate sum paid out for stamps, as required by the order of the railroad commission, which payment will come out of the gross income of the company.

And complainants aver that there is no reason to believe that there can be and will be an increase of complainants' local and intrastate business; that the cost of conducting said business has been

fixed by years of experience, and the amounts now paid therefor are the lowest that can be obtained and adopted and by which the public can be satisfactorily served by said express company; that the charges fixed by said commissioners before the passage of the said revenue law were established so as to enable the company to live, operate and pay a fair dividend or return to its owners for the money and property embarked in the said business, and that the order of the said commissioners requiring the payment by the said company of the said one-cent stamp on all bills of lading and receipts that it issued for the business done was resolved upon by the said commissioners illegally and arbitrarily and will cause a large reduction in the income of the company; that the enforcement of this order will be unfair, unjust, and unreasonable; that the rates of carriage now imposed require the said express company to carry many classes of freight at barely cost, and the expense incident to said service will in future be materially increased by the stamp aforesaid; that the payments for said stamps thus required to be made as a part of the rates imposed on the express company, and under which it must do business by the order of said commission, will result in irreparable damage and injury and will cause a diminution of income, as nearly as can be ascertained, of forty thousand dollars ($40,000) per annum and a loss to complainants in a decreased value of their shares of ten thousand dollars or other large sum.

Twelfth. That your orators are informed and verily believe that, in compliance with the requirements of the orders of the railroad commission of Georgia, as aforesaid, the said The Southern Express Company and its directors have avowed their intention and purpose to comply therewith and take no steps whatsoever to
9 resist the enforcement of the order of the said commissioners, for fear of the penalties which may be assessed against them in the event of their non compliance with the order of the commission.

Thirteenth. Your orators further show that this suit is not a collusive one to confer on a court of the United States jurisdiction of the case, of which it would not otherwise have cognizance, and that they duly requested the Southern Express Company and its directors, and each of them, in writing to omit and refuse to pay and to refrain from paying the said tax, and to contest the constitutionality of the said action, and to refrain from voluntarily placing stamps upon its said receipts and cancelling the same before delivery, and to apply to a court of competent jurisdiction to determine the liability of the company under the said act, in the mode and manner as required by the said railroad commission; that a copy of the said request is hereto annexed as Exhibit "A" and made a part of this bill of complaint; that said express company, after a meeting of the directors, at which the matter of the request was formally laid before them for action, they, as your orators are informed and verily believe, refused and still refuse and intend not to comply with your orators' demand, and, as your orators are informed and verily believe, they have resolved and determined and

intend to comply with all and singular the provisions of the order of the said railroad commission; that a copy of the reply sent to complainants by the said Southern Express Company is hereto annexed as Exhibit "B" to this complaint; that it is stated in the said reply that the company would file an application to be allowed to collect from the shipper, in addition to the existing rates sanctioned by the commission, the war-revenue tax, held by the commission to be payable by the company; that upon the receipt of this reply complainants delayed action but have now had transmitted to them by the said Southern Express Company a certified copy of the resolution of the board of directors, dated August 29, 1898, which sets forth the fact that the application filed by the company to be allowed to collect from the shipper the one cent upon each receipt or bill of lading has been refused, and that the company will now proceed to respect and obey the order of the commission requiring it to pay the war-revenue tax on interstate business without endeavoring to collect the same from shippers, a copy of which is hereto annexed, marked Exhibit "C;" to all of which exhibits express reference is prayed.

Fourteenth. Your orators further show that the said Southern Express Company and its directors, having declared their intention to do so, will now pay the said revenue tax out of the income and profits of the company, and will thereby diminish the assets of the company and lessen the dividends thereon and the value of its shares, and will also pay the tax to the State on its gross income without any deductions therefrom of the revenue tax so imposed; that the voluntary compliance with the provisions of the said order of the railroad commission will expose the express company to a multiplicity of suits by and on behalf of its numerous shareholders, which will work irreparable injury to the business of the company and involve it in great and irreparable damage to your orators and of all the other shareholders.

Fifteenth. Your orators further show that this is a suit of a civil nature in equity; that the matter of dispute exceeds, exclusive of interest and cost, the sum or value of five thousand dollars ($5,000), and arises under the Constitution and laws of the United States.

Wherefore, and in consideration whereof, and forasmuch as your orators are remediless in the premises at any by the strict rules of the common law, and are relievable only in a court of equity, where matters of this nature are cognizable and relievable—

Your orators pray:

1. That it may be adjudged and decreed that the order of the railroad commission of the State of Georgia of August 2, 1898, requiring the Southern Express Company to pay the amount of the war-revenue tax on business from one point to another in the State of Georgia without endeavoring to collect the same from shippers or requiring them to make the payment thereof before the issuing of the said receipts or bills of lading, to be without jurisdiction on the part of the said commission, unconstitutional, null and void.

2. That the Southern Express Company, its officers and agents,

be restrained from voluntarily complying with the provisions of the said order of the said railroad commission of August 2, 1898, and paying the said war-revenue tax as aforesaid.

3. That the attorney general of the State of Georgia be restrained from instituting any suit of any sort against the Southern Express Company for the purpose of enforcing the provisions of the said order of the said railroad commission of August 2, 1898.

4. That a writ of provisional and perpetual injunction, of the same purport, tenor and effect, as hereinbefore set forth, be granted to complainants.

5. That your orators may have such other and further relief in the premises as the nature of the case shall require and to a court of equity may seem meet.

To the end, therefore, that the said defendants may, if they can, show why your orators should not have the relief herein and hereby prayed, and may full, true, direct, and perfect answers make to the best and utmost of their knowledge, remembrance, information, and belief, the said Southern Express Company under its corporate seal, and the other defendants not under oath, an answer under oath being hereby expressly waived, to each and all of the matters and things in this bill of complaint contained, and that as fully and particularly as if the same were here repeated, paragraph by paragraph, and they were specially interrogated thereunto.

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And may it please your honors to grant unto your orators the writ of subpœna of the United States of America, directed to the said defendants, The Southern Express Company, Leander N. Trammell, Thomas C. Crenshaw, and Spencer R. Atkinson, individually and as railroad commissioners of the State of Georgia, and Joseph M. Terrell, individually and as the attorney general of the State of Georgia, commanding them and each of them, on a certain day and under a certain penalty to be therein inserted, to be and appear before your honors in this honorable court, and then and there full, true, direct, and perfect answer make to all and singular the premises; and further, to perform and abide by such further order and decree as to your honors shall seem meet.

And your orators, as in duty bound, will ever pray, etc.

FRANK H. MILLER,
Solicitor for Complainants.

EXHIBIT A.

No. 128 BROADWAY,
NEW YORK CITY, *August* 8, 1898.

To Henry B. Plant, president, and to the board of directors of the Southern Express Company, and also to the Southern Express Company in its capacity as a corporation created by and existing under the laws of the State of Georgia:

Please take notice that we are shareholders in the Southern Express Company to the amounts set opposite to our respective names hereto attached.

We are informed that the company intend to voluntarily comply with the requirements of the order of the railroad commission of the State of Georgia dated August 2, 1898, which order imposes upon the Southern Express Company the duty of furnishing at its own expense, the revenue stamps required to be attached to bills of lading or receipts before receiving and forwarding goods tendered for shipment, the said stamp tax being imposed by the act of Congress approved June 13, 1898, entitled An act to provide ways and
12 means to meet war expenditures and for other purposes, particularly specified in sections 6 and 26, Schedule A, thereof.

We claim that the action of the said railroad commission of the State of Georgia is illegal, invalid, beyond their jurisdiction, unconstitutional, null and void.

As such shareholders in the Southern Express Company, we hereby protest against any action of the Southern Express Company and its directors in voluntarily complying with the order of the said railroad commissioners of the State of Georgia and their construction of the provisions of the said act of Congress as binding upon the Southern Express Company, and we hereby request that the Southern Express Company and its directors shall refrain from voluntarily accepting the said order or complying therewith and voluntarily paying the said stamp tax provided in the said act of Congress in the mode and manner required by the said order of the said commissioners of railway in the State of Georgia.

We further request that the said Southern Express Company and its directors shall contest the validity, legality, and constitutionality of the action of the said railroad commissioners of the State of Georgia, as set forth in their said order of August 2, 1898, and protect the shareholders of the Southern Express Company by applying to a court of competent jurisdiction to determine the liability of the same company under the same, and also to take such further steps as may be necessary to protect the rights of the shareholders, for whom the corporation acts in carrying on its business.

Very truly yours,

W. B. DINSMORE, 100 shares.
C. GRAY DINSMORE,
By DUMONT CLARKE, *Agent*, 100 shares.
ESTATE OF W. B. DINSMORE,
By DUMONT CLARKE, 800 shares,
Executor and Trustee.

EXHIBIT B.

Meeting held at the office of the Southern Express Company, No. 12 West 23rd street, New York city, August 8, 1898, in pursuance of the call of the acting president.

Present: Messrs. H. J. O'Brien, M. F. Plant, and Henry Sanford, directors.

In the absence in Europe of the secretary, Mr. W. H. Hendee was requested to act as secretary.

A communication addressed to—

13 "Henry B. Plant, president, and to the board of directors "of the Southern Express Company, and also to the said "Southern Express Company, in its capacity as a corporation, created "by and existing under the laws of the State of Georgia," and signed by Messrs. W. B. Dinsmore and others, was read by the secretary, as follows:

"Please take notice that we are shareholders in the Southern Ex- "press Company to the amounts set opposite to our respective names, "hereto attached.

"We are informed that the company intends to voluntarily com- "ply with the requirements of the order of the railroad commission "of the State of Georgia, dated August 2, 1898, which order imposes "upon the Southern Express Company the duty of furnishing, at "its own expense, the revenue stamps required to be attached to "bills of lading or receipts before receiving and forwarding goods "tendered for shipment, the said stamp tax being imposed by the "act of Congress approved June 13, 1898, entitled 'An act to pro- "vide ways and means to meet war expenditures, and for other "purposes,' particularly specified in sections six and twenty-six, "Schedule A, thereof.

"We claim that the action of the railroad commission of the State "of Georgia is illegal, invalid, beyond their jurisdiction, unconstitu- "tional, null and void.

"As such shareholders in the Southern Express Company we "hereby protest against any action of the Southern Express Com- "pany and its directors in voluntarily complying with the said order "of the said railroad commissioners of the State of Georgia and their "construction of the provisions of the act of Congress as binding "upon the Southern Express Company, and we hereby request that "the Southern Express Company and its directors shall refrain from "voluntarily accepting the said order, or complying therewith, and "voluntarily paying the said stamp tax provided in the said act of "Congress in the mode and manner required by the said order of "the said commissioners of railway in the State of Georgia.

"We further request that the said Southern Express Company "and its directors shall contest the validity, legality, and constitu- "tionality of the action of the railroad commissioners of the State "of Georgia, as set forth in their said order of August 2, 1898, and "protect the shareholders of the Southern Express Company by "applying to a court of competent jurisdiction to determine the lia- "bility of the said company under the same, and also to take such

"further steps as may be necessary to protect the rights of

14 "the shareholders, for whom the corporation acts in carrying "on its business."

Thereupon, on motion, duly seconded, it was—

Resolved, That the board of directors deem it inexpedient to comply with the demand of Messrs. Dinsmore and the estate of W. B. Dinsmore on the ground that the failure to comply with the requirements of the order of the Georgia railroad commissioners August 2, 1898, would subject the company to litigation with the

authorities of the State of Georgia and the State railway commission, and the company run the risk of incurring penalties under the laws of Georgia and of so clouding its title to its corporate franchise and rights as to embar-ass its action.

On motion, duly seconded, it was further—

Resolved, That the company will notify the railroad commission of Georgia that while respectfully protesting against the legality and validity of its order of August 2, 1898, the company will abide by and perform the same, and also that the company will file its application to said commission to be allowed to collect from the shipper, in addition to the existing rates, sanctioned by the commission, the amount of war-revenue tax held by the commission to be payable by the company, and in aid thereof will present to the commission a renewed request for the suspension of the order of August 2, 1898, until decision has been rendered on such application.

On motion, duly seconded, it was further—

Resolved, That a copy of the foregoing resolutions shall be transmitted by the secretary of this meeting, duly certified, under the company's seal, to Messrs. W. B. Dinsmore and others.

On motion, duly seconded, the meeting was then adjourned.

Office of Southern Express Company.

NEW YORK, *August* 8, 1898.

I, W. H. Hendee, acting secretary, do hereby certify the foregoing to be a true copy of the minutes of a meeting of the directors of the Southern Express Company held this date.

In witness I have thereunto set my signature and the seal of said company this August the 8th, 1898.

W. H. HENDEE,
Acting Secretary.

EXHIBIT C.

Meeting held at the office of the Southern Express Com-
15 pany, No. 12 West 23rd street, New York city, August 29, 1898, in pursuance of the call of the acting president.

Present: Messrs. M. J. O'Brien, M. F. Plant, and Henry Sanford, directors.

In the absence of the secretary, Mr. E. M. Williams was requested to act as secretary.

The meeting being informed that the railroad commission of Georgia has denied the application of the company to be allowed to collect from the shipper, in addition to the existing rates sanctioned by the commission, the amount of the war-revenue tax held by the commission to be payable by the company, and that the company was now observing the Georgia railroad commission's rates on intrastate business in Georgia, and was, as to such business, paying the amount of the war-revenue tax without charging the same to the shipper or endeavoring to collect the same from the shipper, it was, on motion duly seconded—

Resolved, That the course pursued by the company in the foregoing particulars be, and the same is hereby, approved, as it is deemed expedient to comply with the orders of the railroad commission of Georgia in the premises in order to avoid the risk of incurring penalties under the laws of Georgia and of so clouding the company's title to its corporate franchise and rights as to embar-ass its action; and be it further

Resolved, That Messrs. W. B. Dinsmore and others, whose communication was considered at the board meeting held on the 8th instant, shall be notified by the acting secretary of the decision of the Georgia railroad commission and of the action taken thereon, as evidenced by the foregoing resolution.

On motion, duly seconded, the meeting was then adjourned.

E. M. WILLIAMS,
Acting Secretary.

Office of the Southern Express Company.

NEW YORK, *August* 29, 1898.

I, E. M. Williams, acting secretary, do hereby certify the foregoing to be a true copy of the minutes of a meeting of the directors of the Southern Express Company held this date.

In witness I have thereunto set my signature and the seal of said company this August the 29th, 1898.

E. M. WILLIAMS,
Acting Secretary.

16 UNITED STATES OF AMERICA:

Bill in Equity.

Circuit Court U. S., Southern Dist. of Ga., N. E. Division.

WM. B. DINSMORE ET AL.
vs.
THE SOUTHERN EXPRESS COMPANY ET AL.

Personally appeared Dumont Clarke, who, being duly sworn, doth depose and say that he is one of the complainants in the above-stated cause; that he has read the said bill and knows the contents thereof; that the facts set forth therein, so far as they purport to be stated on his own knowledge, are true, and so far as they purport to be stated on information and belief he believes them to be true.

DUMONT CLARKE.

Sworn to and subscribed before me this 25th day of October, 1898, in the city of New York.

J. J. BENNETT,
[NOTARIAL SEAL.] *Notary Public, Kings Co., N. Y.*

Certificate filed in New York county.

Endorsement: No. 29. Circuit court of the United States, southern district of Georgia, northeastern division. William B. Dins-

more *et al. vs.* The Southern Express Company *et al.* In equity. Original bill. Filed in office October 27, 1898. Geo. K. Calvin, deputy clerk. Frank H. Miller, sol'r for complainants.

Equity Subpœna to Appear and Answer.

UNITED STATES OF AMERICA,
Northeastern Division, Southern District of Georgia.

WILLIAM B. DINSMORE ET AL., Complainants,
and
THE SOUTHERN EXPRESS COMPANY ET AL., Defendants.
In Equity. No. 29.

The President of the United States of America to the Southern Express Company, Leander N. Trammell, Thomas C.
17 Crenshaw, Spencer R. Atkinson, and Joseph M. Terrell individually, and to Leander N. Trammell, Thomas C. Crenshaw, and Spencer R. Atkinson as railroad commissioners of the State of Georgia, and to Joseph M. Terrell as attorney general of the State of Georgia, Greeting:

For certain causes offered before the judges of the circuit court of the United States for the southern district of Georgia, in equity, you, and each of you, are hereby commanded and strictly enjoined that, laying all other matter aside and notwithstanding any other excuse, you personally be and appear at the clerk's office of the said court, in the city of Augusta, at rules to be had on the first Monday in December next, to answer to those things which shall then and there be objected to you in a bill in equity, filed October 27th, 1898, and to do further and receive what the said court shall have considered in that behalf, and this you may in nowise omit, under penalty of five hundred dollars; and have here this writ.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 27th day of October, in the year of our Lord one thousand eight hundred and ninety-eight.

[SEAL OF COURT.] GEO. K. CALVIN,
Deputy Clerk.

MEMORANDUM.—The defendants are to enter their appearance in the suit above stated in the clerk's office on or before the day at which this writ of subpœna is returnable; otherwise the bill may be taken *pro confesso*.

GEO. K. CALVIN,
Deputy Clerk.

Endorsement: In the circuit court of the United States for the N. E. division, southern district of Georgia, December rules, 1898. William B. Dinsmore *et al.*, complainants, and The Southern Express Company *et al.*, defendants. In equity. Original subpœna in equity. Issued 27th day of October, A. D. 1898. Geo. K. Calvin, deputy clerk. Frank H. Miller, complainants' solicitor.

Marshal's Return.

I hereby certify that on the 28th day of October, 1898, at the city of Augusta, in my district, I personally served the within subpœna in equity upon the within-named The Southern Express Company by exhibiting to Hugh Dempsey, superintendent of said 18 company at Augusta, Ga., the within original, and at the same time leaving with him a copy thereof.

Augusta, Ga., Oct. 28th, 1898.

JOHN M. BARNES,
U. S. Marshal,
By GEO. H. THOMAS, *Deputy.*

Marshal's return filed Oct. 28, 1898.

GEO. K. CALVIN,
Deputy Clerk.

Marshal's Return.

(Endorsed on second original of foregoing writ of subpœna, issued for service in the northern district of Georgia.)

I hereby certi-y that on the 29th day of October, 1898, at the city of Atlanta, in my district, I personally served the within subpœna in equity upon the within-named Leander N. Trammell, Thomas C. Crenshaw and Spencer R. Atkinson, as individuals and as railroad commissioners of the State of Georgia, and upon the within-named Joseph M. Terrell as an individual and as attorney general of the State of Georgia, by exhibiting to each of them the within writ of subpœna and at the same time leaving with each of them a true copy thereof.

W. H. JOHNSON,
United States Marshal, Northern District of Georgia.

Marshal's return filed this 2nd day of November, 1898.

GEO. K. CALVIN,
Deputy Clerk.

Amendment to Original Bill.

Circuit Court of the United States, Southern District of Georgia, Northeastern Division.

WILLIAM B. DINSMORE ET AL.
versus
THE SOUTHERN EXPRESS COMPANY ET AL. } In Equity.

And now comes the plaintiff, and by way of amendment to the bill filed October 27, 1898, adds the word "junior" to the name of Thomas C. Crenshaw, where it appears in the introductory part of the petition and the prayer for process; and further amends the said prayer for process by interlining in the sixth (6th) line thereof the

words: "Comprising all the members of and constituting the
19 said railroad commission of the State of Georgia," so that the said prayer for process will read as follows:

"And may it please your honors to grant unto your orators the writ of subpœna of the United States of America, directed to the said defendants, The Southern Express Company, Leander N. Trammell, Thomas C. Crenshaw, Jr., and Spencer R. Atkinson, individually and as railroad commissioners of the State of Georgia, comprising all the members of and constituting the said railroad commission of the State of Georgia, and Joseph M. Terrell, individually and as the attorney general of the State of Georgia, commanding them and each of them, on a certain day and under a certain penalty to be therein inserted, to be and appear before your honors in this honorable court, and then and there full, true, direct and perfect answer make to all and singular the premises, and further to perform and abide by such further order and decree as to your honors shall seem meet.

"And your orators in duty bound will ever pray, etc."

FRANK H. MILLER,
Compl'ts' Sol'r.

UNITED STATES OF AMERICA, }
Southern District of Georgia, Northeastern Division. }

Personally appeared Frank H. Miller, who being duly sworn says he is complainants' solicitor. That the facts set forth in the foregoing amendment are true. That he has been informed by the deputy clerk of the court that no copy of the bill has been taken out of the clerk's office, and that but one copy of the subpœna issued in the cause under the duplicate or second original for the northern district of Georgia was issued by him and served on the respective railroad commissioners.

Sworn to and subscribed before me this November 8th, 1898.

FRANK H. MILLER.
GEO. K. CALVIN,
U. S. Commissioner, Southern District of Ga.

Endorsement: No. 29. Circuit court of the United States, southern district of Georgia, northeastern division. William B. Dinsmore *et al. vs.* The Southern Express Company *et al.* In equity. Amendment to original bill. Filed in office November 8th, 1898. Geo. K. Calvin, deputy clerk.

20 *Equity Subpœna to Appear and Answer.*

UNITED STATES OF AMERICA,
Northeastern Division, Southern District of Georgia.

WILLIAM B. DINSMORE ET AL., Complainants,
and
THE SOUTHERN EXPRESS COMPANY ET AL., Defendants.
In Equity. No. 29.

The President of the United States of America to the Southern Express Company, Leander N. Trammell, Thomas C. Crenshaw, Junior, and Spencer R. Atkinson, individually and as railroad commissioners of the State of Georgia, comprising all the members of and constituting the said railroad commission of the State of Georgia, and Joseph M. Terrell, as attorney general of the State of Georgia, Greeting:

For certain causes offered before the judges of the circuit court of the United States for the southern district of Georgia, in equity, you and each of you are hereby commanded and strictly enjoined that, laying all other matter aside and notwithstanding any other excuse, you personally be and appear at the clerk's office of the said court, in the city of Augusta, at rules to be had on the first Monday in December next, to answer to those things which shall then and there be objected to you in a bill in equity filed Oct. 27, 1898, in the case above stated, and this day amended by adding the word Junior after the name of Crenshaw, and to the prayer for process the words "comprising the members of and constituting the said railroad commission of the State of Georgia;" and to do further and receive what the said court shall have considered in that behalf, and this you may in nowise omit, under penalty of five hundred dollars; and have here this writ.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 8th day of November, in the year of our Lord one thousand eight hundred and ninety-eight.

[SEAL OF THE COURT.] GEO. K. CALVIN,
Deputy Clerk.

MEMORANDUM.—The defendants are to enter their appearance in the suit above stated in the clerk's office on or before the day at which this writ of subpœna is returnable; otherwise the bill may be taken *pro confesso*.

GEO. K. CALVIN,
Deputy Clerk.

21 Endorsement: In the circuit court of the United States for the northeastern division, southern district of Georgia, December rules, 1898. William B. Dinsmore *et al.*, complainants, and The Southern Express Company *et al.*, defendants. In equity. Original subpœna in equity upon amendment to bill. Issued 8th day of November, A. D. 1898. Geo. K. Calvin, deputy clerk. Frank H. Miller, complainants' solicitor.

This is a copy of the subpœna sued out of the proper district.

FRANK H. MILLER,
Compl'ts' Sol'r.

Marshal's Return.

I hereby certify that on the 10th day of November, 1898, at the city of Atlanta, in my district, I personally served the within subpœna in equity upon the within-named Leander N. Trammell and Spencer R. Atkinson, members of the railroad commission of the State of Georgia; also upon Leander N. Trammell, chairman of the said commission, and upon the within-named Joseph M. Terrell as attorney general of the State of Georgia, by exhibiting to each of them the within writ of subpœna and at the same time leaving with each one of them as such commissioners and the said Trammell as chairman and said attorney general, a true copy thereof.

W. H. JOHNSON,
U. S. Marshal, N. D. of Ga.

I hereby certify that on the 14th day of November, 1898, in the city of Atlanta, in my district, I personally served the within subpœna in equity upon the within-named Thomas C. Crenshaw, Jr., by exhibiting to him the within writ of subpœna and at the same time leaving with him as such railroad commissioner a true copy thereof.

W. H. JOHNSON,
U. S. M., N. D. of Ga.,
By W. C. THOMAS, *Deputy.*

Marshal's return filed November 15th, 1898.

GEO. K. CALVIN,
Deputy Clerk.

22 *Precept for Appearance.*

STATE OF GEORGIA, ATTORNEY GENERAL'S OFFICE,
ATLANTA, *Nov.* 22, 1898.

Hon. Geo. K. Calvin, deputy clerk U. S. court, Augusta, Ga.

DEAR SIR: Please enter my appearance in the case of William B. Dinsmore, *et al., vs.* Southern Express Company, *et al.*, as of counsel for the railroad commission and attorney general, who are named as parties defendant.

Please acknowledge receipt of this request, and oblige,

Yours very truly, J. M. TERRELL.

Filed November 23rd, 1898.

GEO. K. CALVIN,
Deputy Clerk.

Equity Order for Appearance.

United States Fifth Circuit Court, Southern District of Georgia, Northeastern Division.

WILLIAM B. DINSMORE ET AL., Complainants,
and
THE SOUTHERN EXPRESS COMPANY ET AL., Defendants. } In Equity.

On filing precept in this cause, and on motion of J. M. Terrell, solicitor for the railroad commission and the attorney general,

Ordered, that his appearance as solicitor for said defendants be, and the same hereby is entered, and that the cause be now docketed for said defendants.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this twenty-third day of November, A. D. 1898.

[SEAL OF COURT.] GEO. K. CALVIN,
Deputy Clerk.

Endorsement: U. S. fifth circuit court, southern district of Georgia, N. E. division. Wm. Dinsmore *et al.*, complainants, and The Southern Express Company *et al.*, defendants. In equity. 23 Precept for appearance, and order thereon. Filed and entered this 23rd day of November, 1898. Geo. K. Calvin, deputy clerk. J. M. Terrell, solicitor for defendants within named.

Demurrer of Defendants L. N. Trammell et al.

Circuit Court of the United States, Southern District of Georgia, Northeastern Division.

WILLIAM B. DINSMORE ET AL.
vs.
THE SOUTHERN EXPRESS COMPANY ET AL. } In Equity.

Demurrer of defendants L. N. Trammell, Thomas C. Crenshaw, Jr., and Spencer R. Atkinson, composing the railroad commission of the State of Georgia, individually and as railroad commissioners, and Joseph M. Terrell, individually and as attorney general of said State, to the bill of complaint of the above-named plaintiffs and the amendment thereto.

These defendants by protestation, not confessing or acknowledging all or any of the matters or things in the said bill of complaint, and amendment thereto, contained, to be true in such manner and form as the same are therein set forth and alleged, doth demur to the said bill and amendment. And for cause of demurrer showeth:

First. That it appeareth by the said bill and amendment that they are not entitled to the relief prayed for therein against these defendants.

Second. That there is no equity in said bill and amendment, and for special cause of demurrer these defendants showeth:

First. That complainants have full, adequate and complete remedy at common law. (*a.*) Because if the order of the said railroad commission complained of in said bill is unauthorized by the constitution and the laws it is a nullity and would be so held in the suit or suits for the recovery of the penalty for the violation of the rules and orders of the said commission as provided by the laws of Georgia. (*b.*) Because if the said order of the railroad commission is unjust and unreasonable no penalty can or will be imposed by the court having jurisdiction of the suit to recover such penalty for the violation of said order.

Second. That the court has no jurisdiction of the matters set forth in complainants' bill, or to grant relief in the premises. (*a.*)
24 Because the superior courts of the State of Georgia have exclusive jurisdiction of the penalty suits authorized to be brought against express companies for violating the rules and orders of the railroad commission, and are alone empowered to fix the penalties prescribed by law for a violation of the said rules and orders. (*b.*) Because the acts complained of against these defendants as set forth in said bills are clearly within the jurisdiction and the discretion of the railroad commission of Georgia, under the constitution and laws of said State, and the courts have no jurisdiction to control said commission in such matters, nor to restrain by injunction the exercise of such discretion, it not appearing from the allegations in said bill that there was any denial of the constitutional rights of complainants or of the Southern Express Company, or any gross abuse of discretion. (*c.*) Because the power to prescribe just and reasonable rates is legislative and not judicial, and therefore the courts have no jurisdiction to inquire whether such power *were* well and properly exercised by the said commission; especially is this true on the presentation of the facts as set out in complainants' bill.

Third. That complainants' bill is in effect a suit against the State of Georgia without her consent, and is contrary to the eleventh amendment to the Constitution of the United States, and that on this account, therefore, the court has not jurisdiction. (*a.*) Because under the law the penalty suits above referred to are required to be brought in the name of the State and the sums recovered are to be paid into the State treasury to be used as the General Assembly may direct.

Wherefore, and for divers other good causes of demurrer, these defendants doth demur thereto. And they pray the judgment of this honorable court whether they shall be compelled to make any answer to said bill; and they humbly pray to be hence dismissed with their reasonable costs in this behalf sustained.

J. M. TERRELL,
Solicitor and of Counsel for Defendants in Whose Behalf this Demurrer is Made.

I hereby certify that the foregoing demurrer is in my opinion well founded in law.

J. M. TERRELL,
Of Counsel as Above Mentioned.

STATE OF GEORGIA, *Fulton County.*

ATLANTA, GA., *December 1st*, 1898.

L. N. Trammell, being duly sworn, deposes and says: I am
25 one of the above-named defendants, and the foregoing demurrer is not filed for delay.

Sworn to and subscribed before me this 1st day of December, 1898.

L. N. TRAMMELL.

[SEAL.] J. D. MASSEY,
Notary Public, Fulton County, Georgia.

Endorsement: Circuit court of the United States, southern district of Georgia, northeastern division. William B. Dinsmore *et al. vs.* The Southern Express Co. *et al.* In equity. Demurrer of defendants L. N. Trammell *et al.* Filed in office this 2nd day of December, 1898. Geo. K. Calvin, deputy clerk. J. M. Terrell, of counsel for said defendants.

Demurrer of Defendant J. M. Terrell.

Circuit Court of the United States, Southern District of Georgia, Northeastern Division.

WILLIAM B. DINSMORE ET AL. *vs.* THE SOUTHERN EXPRESS COMPANY ET AL. } In Equity.

Special demurrer of defendant Jos. M. Terrell, individually and as attorney general of Georgia.

In addition to the grounds set forth in the general and special demurrer which this defendant in connection with L. N. Trammell, T. C. Crenshaw and S. R. Atkinson has this day filed he by protestation, not confessing or acknowledging all or any of the matters or things in the said bill of complaint to be true in such manner and form as the same are therein set forth and alleged, doth further specially demur to the *specially demur* to the said bill. And for cause of special demurrer showeth,

First. That it appeareth by the plaintiffs' own showing by the said bill that they are not entitled to the relief prayed by the said bill against this defendant. (*a*) Because under the law he neither individually, nor as attorney general, would or could bring a suit against the Southern Express Company to recover the penalty prescribed by law for a violation of the rules and orders of the railroad commission, unless the said commission ordered such suit, and if the court enjoins the commission from ordering same no suit
26 could be brought. (*b*) Because it is necessary to presume that the railroad commission will violate the orders of this

court before this defendant individually or officially could bring such suit, which presumption is unauthorized and illegal.

Wherefore, he prays the judgment of this honorable court whether he shall be compelled to make any answer to the said bill; and he humbly prays to be hence dismissed with his reasonable costs in this behalf expended.

J. M. TERRELL,
Solicitor and Counsellor in Propria Persona.

I hereby certify that the foregoing demurrer is in my opinion well founded in law.

J. M. TERRELL,
Solictor and Counsellor.

Atlanta, Ga., Dec. 1, 1898.

Endorsement: Circuit court of the United States, southern district of Georgia, northeastern division. William B. Dinsmore *et al. vs.* The Southern Express Co. *et al.* Demurrer of defendant J. M. Terrell. Filed in office this second day of December, 1898. Geo. K. Calvin, deputy clerk. J. M. Terrell, of counsel for defendant.

Order Setting Down Demurrers for Hearing.

January Rules, 1899.

WILLIAM B. DINSMORE ET AL.
vs.
THE SOUTHERN EXPRESS COMPANY ET AL.

Order setting down demurrers for hearing.

And now on motion of Frank H. Miller, Esq., solicitor for complainants in the above-stated cause, it is ordered that the demurrers of defendants in the above-stated cause be and the same are hereby set down for hearing and argument at the conveniences of the court.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, at Augusta, this 2nd day of January, A. D. 1899.

[SEAL OF COURT.] GEO. K. CALVIN,
Deputy Clerk.

27 Endorsement: U. S. circuit court, N. E. division, southern district of Ga. Wm. B. Dinsmore *et al. vs.* The Southern Express Company *et al.* Order setting down, at January rules, 1899, demurrers for hearing, etc. Filed this 2nd day of January, 1899. Geo. K. Calvin, deputy clerk.

Extracts from the 26th Annual Report of the Railroad Commission.

The following extracts from the 26th Annual Report of the Railroad Commission of Georgia, for 1898, were offered in evidence by the railroad commissioners and admitted:

Merchandise Rates Per Hundred and Graduated Rates for Packages Weighing Less Than One Hundred Pounds.

As fixed by the railroad commissioners of Georgia.

Distance.	Merchandise rates per 100 lbs.															
		Rates per 100 lbs.	30	40	50	60	70	80	90	100	105	115	120	130	135	140
		Miles.	20	40	60	80	100	130	160	180	200	250	300	350	400	450
Miles.	Cents.	Packages less than 100 lbs.														
1 to 20	30	Over 0, not over 5	25	25	25	25	25	25	25	25	25	25	25	25	25	25
21 to 40	40	Over 5, not over 10	25	25	25	25	25	30	30	30	30	30	35	35	40	45
41 to 60	50	Over 10, not over 20	25	25	25	25	30	30	30	30	35	35	40	45	45	50
61 to 80	60	Over 20, not over 30	25	25	25	30	30	35	35	40	45	50	50	50	55	55
81 to 100	70	Over 30, not over 40	25	25	30	35	40	45	45	50	50	60	65	65	70	75
101 to 130	80	Over 40, not over 50	25	30	35	40	45	50	55	60	65	70	75	80	85	90
131 to 160	90	Over 50, not over 60	25	30	35	45	55	60	65	70	75	85	95	100	105	110
161 to 180	1.00	Over 60, not over 70	25	35	45	50	60	70	75	80	95	100	110	120	130	130
181 to 200	1.05	Over 70, not over 80	30	40	50	60	70	75	90	100	105	115	120	130	135	140
201 to 250	1.15	Over 80, not over 90	30	40	50	60	70	80	90	100	105	115	120	130	135	140
251 to 300	1.20	Over 90, not over 100	30	40	50	60	70	80	90	100	105	115	120	130	135	140

Packages weighing five pounds and under shall not be charged more than 25 cents by one company for any distance within this State; but when such packages are handled by two or more companies, each company may charge 25 cents, less 20 per cent.

Tariff B.

Governing perishables, etc.

Rates per Hundred Pounds and Graduated Rates for Packages Weighing Less than One Hundred Pounds.

As fixed by the railroad commission of Georgia.

Miles.	Rates per 100 lbs.	Rates per 100 pounds.	30	30	35	40	45	50	55	60	65	70	75	80	85	90
		Miles.	20	40	60	80	100	130	160	180	200	250	300	350	400	450
	Cents.	Packages less than 100 lbs.														
1 to 450	....	Over 0, not over 5.	25	25	25	25	25	25	25	25	25	25	25	25	25	25
1 to 20	30	Over 5, not over 10.	25	25	25	25	25	25	25	30	30	30	35	40	45	45
21 to 40	30	Over 10, not over 20.	25	25	25	25	25	25	30	30	35	35	40	45	45	45
41 to 60	35	Over 20, not over 30.	25	25	25	25	25	30	30	35	35	40	45	50	55	55
61 to 80	40	Over 30, not over 40.	25	25	25	25	30	30	35	40	40	45	50	55	60	65
81 to 100	45	Over 40, not over 50.	25	25	25	30	30	35	40	40	45	50	55	60	65	70
101 to 130	50	Over 50, not over 60.	25	25	30	30	35	40	40	45	50	55	60	65	70	75
131 to 160	55	Over 60, not over 70.	25	30	30	35	40	45	45	50	55	60	65	70	75	80
161 to 180	60	Over 70, not over 80.	30	30	35	40	45	45	50	55	60	65	70	75	80	85
181 to 200	65	Over 80, not over 90.	30	30	35	40	45	45	50	55	60	65	70	80	85	90
201 to 250	70	Over 90, not over 100.	30	30	35	40	45	50	55	60	65	70	75	80	85	90

NOTE.—Packages weighing five pounds and under shall not be charged more than 25 cents by one company for any distance within this State, but when such packages are handled by two or more companies, each company may charge 25 cents, less 20 per cent.

TARIFF E.

Governing the following perishables when carried by express companies:

Dressed poultry, fresh fish, fresh meat, and sausages.

Rates per One Hundred Pounds and Graduated Rates for Packages Weighing Less than One Hundred Pounds on Above Articles.

As fixed by the railroad commission of Georgia.

Distance.	Rates per 100 lbs.	Rates per 100 pounds.	25	25	25	27	30	35	40	43	45	50	54	58	60	63
		Miles.	20	40	60	80	100	130	160	180	200	250	300	350	400	450
Miles.	Cents.	Packages less than 100 lbs.														
1 to 450	....	Over 0, not over 5	25	25	25	25	25	25	25	25	25	25	25	25	25	25
1 to 20	25	Over 5, not over 10	25	25	25	25	25	25	25	25	25	27	28	30	33	35
21 to 40	25	Over 10, not over 20	25	25	25	25	25	25	25	25	27	28	30	33	35	35
41 to 60	25	Over 20, not over 30	25	25	25	25	25	25	25	27	28	30	33	35	38	40
61 to 80	27	Over 30, not over 40	25	25	25	25	25	25	28	30	30	35	38	40	43	45
81 to 100	30	Over 40, not over 50	25	25	25	25	25	28	30	33	35	38	40	45	45	50
101 to 130	35	Over 50, not over 60	25	25	25	25	30	30	33	35	38	40	45	45	50	55
131 to 160	40	Over 60, not over 70	25	25	25	27	30	33	35	40	40	45	45	50	55	60
161 to 180	45	Over 70, not over 80	25	25	25	27	30	35	40	43	45	50	50	58	60	63
181 to 200	45	Over 80, not over 90	25	25	25	27	30	35	40	43	45	50	50	58	60	63
201 to 250	50	Over 90, not over 100	25	25	25	27	30	35	40	43	45	50	54	58	60	63

31 *Rules.*

Rule 1.

The above tariffs are maximum rates, and will apply to all express companies doing business within the State of Georgia, and will be governed by the rules and regulations of the said express companies as far as said rules are applicable to the business done within the State of Georgia, and are not in conflict with the rules adopted by the commission governing express companies.

Rule 2.

All charges on freights weighing more than five pounds and passing over two or more railroads under the same management and control, by lease, ownership, or otherwise, shall be based on continuous mileage, but when said shipments pass over two or more roads not under the same management and control, by lease, ownership, or otherwise, 30 per cent. may be added to the express standard tariff, based on continuous mileage. When said shipments are handled by two or more express companies, each company may charge its local less ten per cent.

Packages weighing five pounds and under shall not be charged more than 25 cents by one company for any distance within this State, but when such packages are handled by two or more companies, each company may charge 25 cents less 20 per cent.

Rule 3.

The express companies are directed to have published and posted at all their offices in the State of Georgia the said classifications, rates, and rules, with such explanations as are necessary for a full understanding of the same.

Rule 4.

Graduated rates apply to matter weighing less than one hundred pounds.

Rule 5.

Two or more packages weighing each 10 pounds or over, forwarded by one shipper at the same time to one consignee, may be charged for on the aggregate weight as above. Packages
32 weighing less than 10 pounds each shipped as in the foregoing section, may be aggregated, provided they are estimated and charged for as weighing 10 pounds each. Actual weight only must be entered on the waybill. If articles of different classes are aggregated, the charge may be made at the rate applying to the highest class.

Rule 6.

Valuation charges.—When the value of any merchandise shipment (C. O. D., or otherwise) exceeds $50.00, the following additional charge may be made on value (charge for value whether insured or not): When merchandise rate is $1.00 or less per 100

pounds, 5 cents for each $100 value, or fraction thereof. When merchandise rate exceeds $1.00 and not more than $3.00 per 100 pounds, 10 cents for each $100.00 value, or fraction thereof. These rates apply only to packages or shipments of merchandise, jewelry, and valuable papers.

Rule 7.

If C. O. D. matter is refused, or cannot be delivered, the shipper must be immediately notified, and if not disposed of within thirty days after such notice, it may be returned, subject to charge both ways.

Rule 8.

Gunpowder, dynamite, kerosene, benzine, nap-tha, gasoline, matches, and all other explosives or dangerous inflammable oils, acids, or materials may not be received for transportation.

Rule 9.

Fancy poultry, pet stock or dogs that have paid double merchandise rates to fairs and exhibitions may be returned free, if accompanied by a certificate from the secretary that they are being returned to the original owner.

Rule 10.

No express office where express business is done in this State shall be discontinued or abolished without first obtaining the consent of the commission upon application duly filed by said company, wherein shall be cited the reasons stated.

33 Rule 11.

When ice is used for preservation of shipments of commodities in Tariff E, including oysters in shell, deduct twenty-five per cent. (25) from the gross weight.

Opinion of the Court.

In the Circuit Court of the United States for the Northeastern Division of the Southern District of Georgia.

WILLIAM B. DINSMORE ET AL.
vs.
THE SOUTHERN EXPRESS COMPANY ET AL. } In Equity. Bill, etc. Opinion.

Frank H. Miller, solicitor for complainants.

Fleming G. Du Bignon, solicitor for the Southern Express Company.

J. M. Terrell, attorney general of Georgia, for the railroad commission of Georgia, its members, and himself.

Statement of the Case.

William B. Dinsmore, C. Gray Dinsmore, and William B. Dinsmore, C. Gray Dinsmore and Dumont Clarke, as executors of and trustees under the will of William B. Dinsmore, deceased, stockholders of the Southern Express Company, filed their bill with the recitation of facts following: The Southern Express Company is a Georgia corporation. They are its shareholders to the amount of fifty thousand dollars. They are citizens of New York. The railroad commission of Georgia by order passed the 2nd of August, 1898, directed that the Southern Express Company pay the war stamp tax on its manifests and bills of lading required by the act of Congress of the 13th day of June, 1898. By the same order the Southern Express Company was directed to conform therewith without making any demand on shippers for the payment of the tax, and to notify the commission of its compliance in five days from that date, and in default thereof the penalties of the Georgia statutes were threatened. The complainants desired that the express company should refuse to pay the tax, and have the question of its liability settled by the courts and formally requested the company to take this action. The company, however, declined to comply
34 with this request, giving as the reason therefor that it was advised not to subject itself to the risk of incurring the severe penalties imposed by the State legislation and which could be enforced by the commission as threatened, and for the further reason that the charter and franchises of the Company might be impaired by State action. The bill is filed against the Southern Express Company, the railroad commission of Georgia and its members and the attorney general of the State. The attorney general representing himself and the railroad commission demurred to the bill, and the cause was heard upon bill and demurrer. Other facts essential to an understanding of the case may be gathered from the decision of the court.

SPEER, *Judge*:

The parties actually contesting in this proceeding are non-resident stockholders of the Southern Express Company on the one side and the members of the railroad commission and the attorney general of Georgia on the other. The Southern Express Company, a Georgia corporation, is also made a party defendant, and injunction is prayed against it. It may with more propriety, however, be regarded as party plaintiff. It was made to take a position as defendant certainly for one reason and perhaps for another also. It had declined to test in the courts the question whether the war stamp tax on its bills of lading and manifests is payable by the shipper or by itself. This was done because of the enormous penalties from one thousand to five thousand dollars fine in each case with which it was solemnly threatened by the railroad commission, unless in five days it abandoned its contention that the shipper must pay the tax, accept all shipments and itself furnish, affix and cancel the stamps. This is

plain from the resolution of its directors in which they state that "it is deemed expedient to comply with the orders of the railroad commission of Georgia in the premises in order to avoid penalties under the laws of Georgia and so clouding the company's title to its corporate franchises and rights as to embar-ass its action." It is possible also that being a resident corporation the jurisdiction of the court here may have been questioned. The matter to be determined, however, involving the imposition of United States taxation, by State authorities, we may be justified in concluding that the United States court has jurisdiction concurrent with that of the State courts to hear the parties, whether they are citizens of this or of other States. The Southern Express Company then, so far as
35 the jurisdiction can be affected, might well have taken its appropriate position as plaintiff. It cannot be said, however, in view of the averments of the bill and the character of the demurrer that the express company is in a position embar-assing to the court in the determination of the issues of law presented by the pleadings. Those issues are not so extensive as the demurrer of the commission, and the strong, ingenious argument of the attorney general would seem to indicate. They do not for instance render necessary a construction by the court of the act of Congress imposing the war-stamp tax, nor any clause of it. Indeed there are no parties to the record whose demand for the construction of the clause imposing the tax must be regarded. The complainants so far as they are individually concerned, do not ask it. In the brief filed by their counsel, they expressly suggest that the construction of the revenue act is not involved. It is true they pray, that the express company may be restrained from voluntarily complying with the provisions of the order of the railroad commission directing it to furnish the stamps to pay the tax, but surely an injunction to this effect would be superfluous. There was and is and will be nothing "voluntary" to be discovered in the action of the express company in this regard. It not only refused to pay the tax, but when ordered to do so by the commission complied most reluctantly and for fear of the more serious impositions the commission had in store for it. Why then should the court parade its authority to enjoin the express company not to make payments it would be delighted to escape?

Nor can it be said that the State has a right to ask a construction to the act. It has no pecuniary interest at stake. To adopt the language of the Supreme Court in a kindred case, Reagan *vs.* Trust Company, 154 U. S., p. 390, "There is a sense, doubtless, that the State is interested in the question, but only in a governmental sense." States however do not enter courts in a governmental sense. They cannot ordinarily be brought into court, but when they condescend to come, they come as do ordinary litigants, and they are not heard unless they have an ascertainable definite interest in the litigation. Here, moreover, the State is not before the court. The commission is here, but the commission does not contend "*L'etat c'est moi*" as did Louis le Grande Monarque. We shall presently see that the commission has as little concern with the construction

of the revenue law as the State which is not before the court. It is true the learned attorney general in his brief states that the demurrer presents this question: "Does the act of Congress levy the stamp tax upon the shipper or express company or is it a general or floating tax?" Now if the attorney general of Georgia
36 were the Attorney General of the United States and was engaged in an effort to enforce the payment of the United States tax from the Southern Express Company, his proposition would probably require judicial determination. The fact however that he appears in this case as the attorney general of the State betrays how untenable is his position. This revenue tax is imposed by the United States. It affects all the people of all the States. It is national in its character, and "admits and requires uniformity of regulation and enforcement in all of the States." It follows that its distribution, apportionment, collection and enforcement is not within the administrative control of the authorities of a particular State. The respective spheres of action of the State and United States courts to use the apposite illustration of Chief Justice Brown, in Hines and Hobbs *vs.* Rawson, 40 Ga., p. 356, are each "as far beyond the reach of the other as if the line between them was traced by landmarks and monuments visible to the eye." Indeed, the action of the railroad commission as recited in the bill and admitted by the demurrer is not only an appropriation of functions belonging exclusively to officials of the United States charged with the collection of the tax, but it is an expansion of its own authority as defined by the law of the State. This is to be found in section 2217 of Civil Code of Georgia, and provides that all express and telegraph companies doing business in whole or part in this State "shall be under the control of the railroad commission of Georgia who shall have full power to regulate the prices to be charged * * * for any service performed by any such company or persons, etc." All of the powers of the commission relative to railroads are extended by this legislation to include telegraph and express companies. Without quoting the voluminous enactments defining the powers of the railroad commission, it will be enough to say that like the section of the code quoted above, so far as they are germane to this controversy, they relate to the fixation of rates or prices for transportation or conveyance. In so far as they are penal in effect, under the familiar rule they must of course be strictly construed. Bearing in mind this cardinal canon of construction with regard to penal legislation, how unprecedented seems that latitudinous interpretation which would make the punishment fixed by the statute apply to the failure of a corporation to pay a disputed stamp tax imposed by the United States upon a written evidence of shipment, required by the United States. This revenue exaction is no part of a rate for the shipment of express matter. It is no part of the price for "a service rendered" the shipper. It is a tax for national purposes and its payment or collection is in no sense directly or indirectly within the sphere "of a State administrative board."

Like the tax on distilled spirits, this is an internal-revenue
37 tax. Should the express company ship a package of any character in the absence of this stamp on the bill of lading,

it would incur a penalty of $50. If it should accept and knowingly "remove" or ship a package of distilled spirits unless it also bore the stamp required by the law, it would be guilty of an infamous offense, and its officers punishable by imprisonment in the penitentiary. Now has the railroad commission control over the shipment of an unstamped cask of liquor? Has it authority to direct that the express company and not the distiller shall pay for and attach the stamp? Has it any authority to threaten the imposition of its crushing penalties on the express company, and thus compel it to remove the liquor before the distiller has attached the stamp which is the evidence that the tax thereon has been paid? This will scarcely be maintained. But in either case the duty of the express company must of necessity be determined by the construction of the United States law. The courts of the State may construe such laws and make their construction effective, unless it should be denied by the courts of the United States, but the commission has no such power, and yet in this case it has gravely construed the act of Congress and issued its mandate accordingly. There can be no doubt that this is a great disadvantage to the express company in this State. It is denied its day in court, and cannot without assuming unwarrantable hazard proceed to test the disputed question of its liability for this tax, as other express companies have done elsewhere. The commission might well have adopted the procedure of the railroad commission of Missouri, relating to the same tax. The Missouri commission were also of the opinion that the tax was payable by the company, but in their order upon the subject, they declared:

"The act referred to however, does not definitely state by whom the required stamp shall be affixed, nor as the commissioners are informed, does the internal-revenue department decide as regards this question. If the stamp must be paid for by the shipper, the aggregate charge to him is increased by the amount paid for the stamp, and so far as he is concerned there is an increase in the rate. But the express companies do not increase their transportation rates, and claim that the stamp required has nothing to do with the service, but is for an entirely separate transaction, which the law requires shall be paid for by some one, as yet undecided, and that after the completion of this separate transaction, the transportation service begins, and for which no more than the legal charge is made. The question to be decided is, by whom must the expense of the required stamp be borne. The opinion of the commissioners is as before stated, but their opinion in this case is not law,
38 nor would it be of any effect in deciding the matter. The question is now in the courts for settlement, and until finally decided, must remain an open one. Should the decision of the courts be adverse to the express companies, and afterwards rates should be increased by them to cover the additional expense incurred by reason of the tax, then the commission would have full jurisdiction, and after hearing, could, if found proper, restore the old rates. As the matter stands, there is no increase in the rate tariffs of the express companies, and as regards the question of lia-

bility for the cost of the stamp required, commissioners decide they have no jurisdiction." How clear, conservative and equitable is this announcement. Neither the shippers nor the company are hindered in their approach to the courts. No fulmination is directed at either. How is it in Georgia? A corporation contributing daily to the comfort and convenience of thousands and doing much for the advancement of the State is practically excluded from the courts, or if it should seek to maintain therein its conception of the law for even a single day, after the five days' grace accorded by the commission, it is threatened with penalties which if imposed upon its conduct of business for a half day would involve it in irretrievable bankruptcy and ruin.

It is insisted, however, by the attorney general, that this court has no jurisdiction to grant any of the plaintiffs' prayers. The argument is that at best the action of the commission complained of is merely a reduction of rates; whether the reduction is reasonable or not is exclusively to be determined by the State courts, in no case can the court enjoin penalty suits; that the company has an adequate defense at law; that in no case except in bankruptcy is an injunction to be granted by a court of the United States to stay proceedings in the State courts and that this is a suit against the State. Many cases are marshaled in support of these propositions. The fundamental misapprehension which has led the attorney general to this incorrect contention and misapplication of precedents seems to proceed from his omission to perceive that the action taken by the commission is not merely unreasonable, but is unauthorized, null and void. Now it cannot successfully be disputed that the courts are open to citizens of the State to protect their property from the unauthorized action of officials and in many cases the Supreme Court of the United States has held that "whenever a citizen of a State can go into the courts of a State to defend his property against the illegal acts of its officers, a citizen of another State may invoke the jurisdiction of the Federal courts to maintain a like defence. A State cannot tie up a citizen of another State, having property rights within its territory invaded by unauthorized acts of its own officers to
suits for redress in its own courts." 169 U. S., p. 517, and
39 authorities cited. The commission then is not above the law in either jurisdiction. Reagan *vs.* Farmers' Loan & Trust Company, 154 U. S., p. 364 (Texas Commission case); Covington, etc., *vs.* The Turnpike Company, 164 U. S, p. 592 (Turnpike case); Smith *vs.* Ames, 169 U. S., p. 516 (Nebraska case). It will be found that these cases, and many others cited by the Supreme Court in its opinions, afford decisive and reiterated refutation to that reasoning intended to defeat the plaintiff's application for injunction against the commission. The Supreme Court holds that "the adequacy or inadequacy of the remedy at law for the protection of the rights of one entitled upon any ground to invoke the powers of the Federal court is not to be conclusively determined by the statutes of the particular State in which suit may be brought." That "the wise policy of the Constitution gives him a choice of tribunals," "that stockholders and incorporations may ask for a decree enjoining the

illegal action of the commission upon the ground that it is unreasonable, unauthorized or is repugnant to the Constitution of the United States." That "the courts of the United States sitting in equity can make a comprehensive decree covering the whole ground of controversy and thus avoid the multiplicity of suits that would inevitably arise under the statute." This holding is precisely in point. It is found in the invaluable opinion of Associate Justice Harlan in Smith *vs.* Ames, *supra*. There the company was as in this case, made liable not only to individual process for every act, matter or thing required to be done, but to a fine of from one thousand to five thousand dollars for the first offense. It is further held that "the transactions with these corporations are so numerous and varied that the interference of equity could well be justified upon the ground that a general decree according to the prayers of the bill would avoid a multiplicity of suits, giving a remedy more certain and efficacious than could be given in any proceeding instituted against the company in a court of law, for a court of law could only deal with each separate transaction involving the rates to be charged for transportation. The transactions of a single week would expose any company questioning the validity of the statute to a vast number of suits by shippers, to say nothing of the heavy penalties named in the statute. Only a court of equity is competent to meet such an emergency and determine once for all and avoid a multiplicity of suits, matters that affect not simply individuals but the interests of the entire community." In the same line of decisions summed up in the case just cited, the argument that the proceeding is against the State and therefore illegal, is also judicially confuted. The Supreme Court holds that the suits are not against the State, but against certain individuals charged with the administration of a State enactment which it is alleged cannot be enforced without violating the constitutional rights of the plaintiff.

In view of these repeated declarations of the Supreme Court of the United States, it is obligatory upon this court to enjoin the enforcement of the order of the railroad commission oppressive to the Southern Express Company, and injurious to its stockholders. This must be done in order that the management of this business, important to the public, may be admitted to the judicial tribunals of the State and of the United States upon a footing of equality with other litigants. The averments of the bill, taken with the brief of counsel, as we have said, at present do not call for a construction of the act of final determination of the liability of the defendant company or the shipper to pay it. Upon this preliminary hearing the decision will therefore be confined to matters distinctly in issue. The prayer for temporary injunction against the express company will be denied, and the railroad commission will be enjoined conformably to the prayers of the bill. It is not deemed necessary to enjoin the attorney general for it is presumed that this eminent lawyer, who is the official head of the bar of the State, will without such injunction accord all appropriate respect to the decision of the court.

Endorsement: United States circuit court, northeastern division, southern district of Georgia. William B. Dinsmore *et al. vs.* The Southern Express Company *et al.* Opinion of the court. Filed this 8th day of March, 1899, at 9 o'clock a. m. Geo. K. Calvin, deputy clerk.

Order of Court on Application for Injunction, etc.

In the Circuit Court of the United States for the Northeastern Division of the Southern District of Georgia.

WILLIAM B. DINSMORE ET AL. vs. THE SOUTHERN EXPRESS COMPANY ET AL.	In Equity. Bill, etc. Application for Injunction, etc.

The above-stated cause having been duly assigned for hearing on the application for temporary injunction, at Augusta, in said district, on the 10th day of February, 1899, and the parties having been fully heard on the bill and the demurrer thereto,
41 and the court having taken time for advisement:

It is now upon consideration ordered, adjudged and decreed that the prayer that the Southern Express Company be enjoined from voluntarily paying the war-stamp tax in question be and the same is hereby denied. Ordered, adjudged and decreed further that the defendants, The Railroad Commission of Georgia, and each member thereof, to wit: the individual defendants, Leander N. Trammell, Thomas C. Crenshaw, Jr., and Spencer R. Atkinson, be and the same are hereby enjoined from any and all order, direction, action or legal steps instituting or tending to institute, and from any and all proceedings for the recovery of the penalties named in the statute of Georgia in that behalf to enforce compliance with its said order against the Southern Express Company, its officers or agents as threatened in the order of said commission, dated August 2, 1898, for the reason that said order is null and void, and said commission has no jurisdiction to adjudge and designate the party who shall pay said tax.

Ordered further that the cause proceed as usual in equity.

March 7th, 1899.

EMORY SPEER, *U. S. Judge.*

Endorsement: United States circuit court, northeastern division, southern district of Georgia. William B. Dinsmore *et al. vs.* The Southern Express Company *et al.* Order of court on application for injunction, etc. Filed March 8th, 1899, at 9 o'clock a. m. Geo. K. Calvin, deputy clerk.

Appeal and Order Allowing Same.

Circuit Court of the United States, Southern District of Georgia, Northeastern Division.

WM. B. DINSMORE ET AL., Plaintiffs, *vs.* SOUTHERN EXPRESS CO. ET AL., Defendants (L. N. Trammell, Thos. C. Crenshaw, Jr., and Spencer R. Atkinson, Railroad Commissioners of Georgia, Individually and as Such Railroad Commissioners, *et al.*, Defendants and Appellants).	In Equity.

42 The following above-named defendants, to wit, L. N. Trammell, Thomas C. Crenshaw, Jr., and Spencer R. Atkinson, composing the railroad commission of the State of Georgia, individually, and as railroad commissioners, conceiving themselves aggrieved by the decree entered on the 7th day of March, 1899, in the above cause, do hereby appeal to the U. S. circuit court of appeals for the fifth circuit, at New Orleans, Louisiana, and pray that this their appeal may be allowed, and that a transcript of the record, proceedings and papers upon which said decree was made, duly authenticated, may be sent to the said U. S. circuit court of appeals for the fifth circuit, at New Orleans, Louisiana.

J. M. TERRELL,
Solicitor for Appellants.

U. S. Circuit Court for the Northeastern Division of the Southern District of Georgia.

Now, to wit, on the 18th day of March, 1899, it is ordered that the appeal may be allowed as prayed for.

EMORY SPEER, *Judge.*

Assignments of Error.

W. B. DINSMORE ET AL., Plaintiffs, *vs.* SOUTHERN EXPRESS CO. ET AL., Defendants (L. N. Trammell, Thos. C. Crenshaw, Jr., and Spencer R. Atkinson, Railroad Commissioners of Georgia, Defendants and Appellants).	In Equity.

Now comes the said L. N. Trammell, Thos. C. Crenshaw, Jr., and Spencer R. Atkinson, composing the railroad commission of Georgia, who appeal from the decree in the above-stated cause, which was entered on the 7th day of March, 1899, and, with their appeal this day allowed, file the following assignment- of error:

1st. That the court erred in not sustaining the demurrer of these defendants to the bill of the said W. R. Dinsmore *et al.* Said demurrer should have been sustained upon each and every ground therein mentioned.

2nd. That the court erred in granting the injunction against these defendants as set out in said decree.

43 3rd. That the court erred in holding the order rendered by these defendants, as railroad commissioners, on the 2nd day of August, 1898, to be null and void.

4th. That the court erred in holding under the facts and circumstances set forth in said bill that these defendants as railroad commissioners of Georgia did not have competent authority under the law for the institution and prosecution of the said threatened suits.

5th. That the court erred in holding that the said action of the said express company in compelling the consignor to pay a charge which had been imposed by the war-revenue act of 1898 upon it did not amount to an increase of the rate prescribed by the said railroad commission for express companies doing business in Georgia.

6th. That the court having under said bill taken jurisdiction in equity for the purpose of preventing the institution and prosecution of a multiplicity of suits respecting the same subject-matter erred in declining to consider, adjudicate and determine the principal matters in controversy—that is to say, whether the said express company or the consignor was liable for said tax, and whether the said express company being so liable the said railroad commission had competent authority to institute and prosecute said threatened suits; and further erred in granting the said injunction without determining said matters.

J. M. TERRELL,
Solicitor for Appellants.

P. O. address, Atlanta, Ga.

Let this assignment of errors be filed with the appeal above allowed.

This March 18th, 1899.

EMORY SPEER, *Judge.*

Endorsement: United States circuit court, northeastern division, southern district of Georgia. William B. Dinsmore *et al.*, pl'ffs, *vs.* Southern Express Company *et al.* Appeal and order allowing same. Assignment of errors and order to file same. Filed March 18, 1899. Cecil Morgan, deputy clerk.

Bond of Appellants.

Circuit Court of the United States, Southern District of Georgia, Northeastern Division.

44 WM. B. DINSMORE ET AL., Plaintiffs,
vs.
SOUTHERN EXPRESS CO. ET AL., Defendants (L. N. Trammell, Thos. C. Crenshaw, Jr., and Spencer R. Atkinson, Railroad Commissioners of Georgia, Individually and as Such Railroad Commissioners, *et al.*, Defendants and Appellants). } In Equity.

Know all men by these presents that we, L. N. Trammell, Thos. C. Crenshaw, Jr., and Spencer R. Atkinson, individually, and as railroad commissioners of Georgia, as principals, and Wm. J. Speer, as security, are held and firmly bound unto Wm. B. Dinsmore and C. Gray Dinsmore, and Wm. B. Dinsmore and C. Gray Dinsmore and Dumont Clarke, as executors of and trustees under the will of Wm. B. Dinsmore, deceased, complainants in the above-stated cause, in the just and full sum of two hundred and fifty ($250.00) dollars, for the true payment of which we bind ourselves, our heirs, executors and administrators firmly by these presents.

Signed, sealed, and delivered this 20th day of March, 1899.

The condition of the above obligation is as follows:

The said Trammell, Crenshaw and Atkinson, individually, and as railroad commissioners, having presented an appeal from the decree entered in the above-stated cause on the 7th day of March, 1899, now should the said appellants well and truly pay or cause to be paid to said complainants all cost in said cause if they should fail to sustain their appeal, then this bond to be void, else of full force and effect.

L. N. TRAMMELL. [L. S.]
THOS. C. CRENSHAW, JR. [L. S.]
W. J. SPEER. [L. S.]

Attest: J. D. MASSEY,
Notary Public, Fulton Co., Ga.

[Notarial Seal.]

Order Approving Bond.

The above and foregoing bond is hereby approved and ordered filed. This 21st day of March, 1899.

EMORY SPEER, *Judge.*

45 *Citation.*

Circuit Court of the United States, Southern District of Georgia, Northeastern Division.

WM. B. DINSMORE ET AL., Plaintiffs,
vs.
SOUTHERN EXPRESS CO. ET AL., Defendants (L. N. Trammell, Thos. C. Crenshaw, Jr., and Spencer R. Atkinson, Railroad Commissioners of Georgia, Individually and as Such Railroad Commissioners, *et al.*, Defendants and Appellants). } In Equity.

L. N. Trammell, Thos. C. Crenshaw, Jr., and Spencer R. Atkinson, individually, and as railroad commissioners of Georgia, having appealed from the decree entered on the 7th day of March, 1899, in the above-stated cause to the U. S. circuit court of appeals for the fifth circuit, and said appeal having been duly allowed, the complainants in the above-stated cause, to wit, Wm. B. Dinsmore and C. Gray Dinsmore, and Wm. B. Dinsmore, C. Gray Dinsmore and Dumont Clarke, as executors of and trustees under the will of Wm. B. Dinsmore, deceased, are required to show cause, if any there be, on the — day of ——, 1899, before the U. S. circuit court of appeals for the fifth circuit, in the city of New Orleans, why said appeal should not be sustained.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States Supreme Court, this the 21st day of March, 1899.

EMORY SPEER, *Judge.*

Acknowledgements of Service.

UNITED STATES OF AMERICA,
Southern District of Georgia, Northeastern Division.

Service of the within citation hereby acknowledged and copy waived.

WM. B. DINSMORE ET AL., *Complainants,*
By FRANK H. MILLER, *Their Solicitor.*

UNITED STATES OF AMERICA,
Southern District of Georgia, Northeastern Division.

46 WM. B. DINSMORE ET AL., Plaintiffs,
vs.
SOUTHERN EXPRESS COMPANY ET AL., Defendants (L. N. Trammell, Thos. C. Crenshaw, Jr., and Spencer R. Atkinson, Railroad Commissioners of Georgia, Individually and as Such Railroad Commissioners, *et al.*, Defendants and Appellants). } Original Citation on Appeal to the U. S. C. Appeals, Fifth Circuit.

Service is hereby acknowledged of a copy of the citation in the above-stated case for and in behalf of the defendants, L. N. Tram-

mell, Thos. C. Crenshaw, Jr., and Spencer R. Atkinson, railroad commissioners of Georgia, individually, and as such railroad commissioners.

March 29, 1899.

F. G. DU BIGNON,
Att'y for Southern Exp. Co.

Endorsement: U. S. circuit court, N. E. division, southern district of Ga. William B. Dinsmore *et al. vs.* The Southern Express Company *et al.* Bond, $250, on appeal, order approving same, and citation. Acknowledgments of service. Filed in office this 22nd day of March, 1899, at 9 o'clock a. m. Geo. K. Calvin, deputy clerk.

Cross-appeal.

In the Circuit Court of the United States for the Northeastern Division of the Southern District of Georgia.

WILLIAM B. DINSMORE ET AL.
vs.
THE SOUTHERN EXPRESS COMPANY ET AL. } In Equity.

And now come the complainants, William B. Dinsmore and C. Gray Dinsmore, and the said William B. Dinsmore, C. Gray Dinsmore, and Dumont Clarke, as executors of and trustees under the will of William B. Dinsmore, deceased, and, conceiving themselves aggrieved by the decree made by said court on the 7th day of March, 1899, in the cause of these complainants against the Southern
47 Express Company, Leander N. Trammell, Thomas C. Crenshaw, Jr., and Spencer R. Atkinson, individually, and as railroad commissioners of the State of Georgia, and Joseph M. Terrell, individually, and as attorney general of the State of Georgia—in refusing an injunction against the Southern Express Company as prayed for in the bill; inasmuch as an appeal has been allowed by the said court March 18th, 1899, from said decree upon the application of the defendants, Leander M. Trammell, Thomas C. Crenshaw, Jr., and Spencer R. Atkinson, individually and as railroad commissioners of the State of Georgia, the said complainants do hereby appeal from the said decree as against them, to the circuit court of appeals for the fifth circuit, and they respectfully pray that this their cross-appeal may be allowed by this honorable court, and that a transcript of the record and proceedings and papers upon which said decree was made may be duly authenticated and sent to the said United States circuit court of appeals for the fifth circuit aforesaid. And they also tender herewith a bond conditioned for the payment of the costs of appeal required by law, in the penal sum of two hundred and fifty dollars, and pray the court approve the said bond and allow this their appeal.

FRANK H. MILLER,
Solicitor for Complainants.

SOUTHERN DISTRICT OF GEORGIA, }
Northeastern Division. }

Now, to wit, on the 28th day of March, 1899, it is ordered that the cross-appeal be allowed as prayed for.

EMORY SPEER, *U. S. Judge.*

Assignment of Errors.

In the Circuit Court of the United States for the Northeastern Division of the Southern District of Georgia.

WILLIAM B. DINSMORE ET AL.
vs.
THE SOUTHERN EXPRESS CO. ET AL. } In Equity.

Filed October 27, 1898.

Now on this the 28th day of March, 1899, come the complainants by Frank H. Miller, their solicitor, and present to the court at the time of the allowance of their cross-appeal assignments of errors, and say that in the record and proceedings in the above-entitled cause there is manifest error, in this to wit:

48 1. That the court erred in denying any injunction against the Southern Express Company as prayed for.

2. That the court erred in refusing to enjoin the Southern Express Company from voluntarily complying with the order of the railroad commission of August 2nd, 1898, set out in the complainants' bill.

3. That the court erred in refusing to enjoin the Southern Express Company from paying the war revenue tax imposed under the act of Congress approved June 13, 1898, entitled, An act to provide ways and means to meet war expenditures, and for other purposes, namely, a stamp of the value of one cent to each bill of lading, manifest, or memoranda, and to each duplicate thereof, which the railroad commission, on August 2nd, 1898, ordered the express company to pay and they continued to pay because of such order.

Wherefore and for divers other causes appearing on the face of said record, the said appellees pray that their cross-appeal be sustained and the cause remanded to the circuit court of the United States for the northeastern division of the southern district of Georgia, and that further proceedings be had in accordance with the mandate of the United States circuit court of appeals.

FRANK H. MILLER,
Sol'r for Complainants (now Appellants).

Let this assignment of errors be filed with the cross-appeal above allowed. EMORY SPEER, *U. S. Judge.*

Endorsement: United States circuit court of appeals for the fifth circuit. Wm. B. Dinsmore *et al.*, appellants, *vs.* L. N. Trammell *et al.*, individually and as the railroad commissioners of the State of Georgia, & The Southern Express Co., appellees. Original cross-

appeal and assignments of error by Wm. B. Dinsmore *et al.* Filed this 29th day of March, 1899. Geo. K. Calvin, deputy clerk.

Costs Bond of Wm. B. Dinsmore et al.

The Circuit Court of the United States for the Northeastern Division of the Southern District of Georgia.

49 WILLIAM B. DINSMORE ET AL.
vs.
THE SOUTHERN EXPRESS COMPANY ET AL. } In Equity. Bill, &c.

Know all men by these presents, that we, William B. Dinsmore and C. Gray Dinsmore, in proper *that we, William B. Dinsmore and C. Gray Dinsmore, in proper* person, and the said William B. Dinsmore, C. Gray Dinsmore, and Dumont Clarke, as executors of and trustees under the will of William B. Dinsmore, deceased, as principals, and Linwood C. Hayne, as surety, are held and firmly bound unto Leander N. Trammell, Thomas C. Crenshaw, Jr., and Spencer R. Atkinson, individually and as railroad commissioners of the State of Georgia, and Joseph M. Terrell, individually and as the attorney general of the State of Georgia, in the sum of two hundred & fifty dollars, for the payment of which well and truly to be made, we bind ourselves and each of us, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this twenty-seventh day of March, 1899.

Whereas the above-named William B. Dinsmore and C. Gray Dinsmore, in proper person, and the said William B. Dinsmore, C. Gray Dinsmore, and Dumont Clarke, as executors of and trustees under the will of William B. Dinsmore, deceased, have presented a cross-appeal, to the United States circuit court of appeals for the fifth circuit, to reverse the decree rendered in the above-entitled cause, which was made and entered in the said circuit court of the United States for the northeastern division of the southern district of Georgia on the seventh day of March, 1899.

Now, therefore, the condition of this obligation is such that if the above-named William B. Dinsmore and C. Gray Dinsmore, in proper person, and the said William B. Dinsmore, C. Gray Dinsmore, and Dumont Clarke, as executors and trustees as aforesaid, shall prosecute said cross appeal to effect and answer all costs if they shall fail to sustain said appeal, then this obligation shall be void, otherwise to remain in full force and virtue.

WILLIAM B. DINSMORE,
C. GRAY DINSMORE,
WILLIAM B. DINSMORE,
C. GRAY DINSMORE, &
DUMONT CLARKE,
Executors of William B. Dinsmore,
WILLIAM B. DINSMORE,
By FRANK H. MILLER,
Their Solicitor.
LINWOOD C. HAYNE. [SEAL.]

50 Signed, sealed and acknowledged before me—

FRANK G. FORD,

[NOTARIAL SEAL.] *Not. Public, Richmond Co., Ga.*

UNITED STATES OF AMERICA,
Southern District of Georgia, Northeastern Division.

Linwood C. Hayne being duly sworn says he is surety on the foregoing bond and is worth the penalty thereof over and above his just debts, liabilities and homestead exemption of this State.

LINWOOD C. HAYNE.

Sworn to and subscribed before me this March 27th, 1899.

FRANK G. FORD,

[NOTARIAL SEAL.] *Not. Public, Richmond Co., Ga.*

The above and foregoing bond is hereby approved and ordered filed, this March 28, 1899.

EMORY SPEER, *U. S. Judge.*

Endorsement: United States circuit court of appeals for the fifth circuit. Wm. B Dinsmore *et al.*, appellants, *vs.* L. N. Trammell *et al.*, individually and as the railroad commissioners of the State of Georgia, and The Southern Express Company, appellees. Costs bond of Wm. B. Dinsmore *et al.* Filed this 29th day of March, 1899. Geo. K. Calvin, deputy clerk.

Citation in Aid of Cross-appeal.

UNITED STATES OF AMERICA,
Southern District of Georgia, Northeastern Division.

To Leander N. Trammell, Thomas C. Crenshaw, Jr., and Spencer R. Atkinson, individually and as the railroad commissioners of the State of Georgia, and Joseph M. Terrell, individually and as the attorney general of the State of Georgia, and to the Southern Express Company:

51 You and each of you are hereby cited and admonished to be and appear at the United States circuit court of appeals for the fifth circuit to be holden at New Orleans in the State of Louisiana, on the seventh day of April, 1899, pursuant to a cross-appeal allowed in open court and filed this day in the clerk's office of the United States circuit court for the southern district of Georgia, northeastern division, wherein William B. Dinsmore and C. Gray Dinsmore, in proper person, and William B. Dinsmore, C. Gray Dinsmore, and Dumont Clarke, as executors of and trustees under the will of William B. Dinsmore, deceased, are appellants, and you the above-named parties to whom this citation is directed, are respondents, to show cause why the decree in the said cross-appeal mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 28th day of March, 1899.

EMORY SPEER, *U. S. Judge.*

Acknowledgments of Service.

UNITED STATES OF AMERICA,
Southern District of Georgia, Northeastern Division.

WM. B. DINSMORE ET AL.
vs.
SOUTHERN EXPRESS CO. ET AL.

Citation on cross-appeal to the United States C. C. appeals, fifth circuit.

Service is hereby acknowledged of a copy of the citation in the above-stated case for and in behalf of the Southern Express Company.

March 29th, 1899.

F. G. DU BIGNON,
Att'y for Southern Exp. Co.

UNITED STATES OF AMERICA,
Southern District of Georgia, Northeastern Division.

52 WILLIAM B. DINSMORE ET AL.
vs.
THE SOUTHERN EXPRESS CO. ET AL.

In equity. Cross-appeal to the U. S. C. C. appeals, fifth circuit.

Service is hereby acknowledged for and in behalf of Leander N. Trammell, Thomas C. Crenshaw, Jr., and Spencer R. Atkinson, individually and as railroad commissioners of the State of Georgia, and Joseph M. Terrell, individually, and as attorney general of the State of Georgia, of a copy of the citation in the above stated case sued out by William B. Dinsmore, *et al.*, original complainants, in aid of the cross-appeal taken by them from the decree of the court of March 7th, 1899.

This March 30th, 1899.

J. M. TERRELL,
Solc. for Respondents Named Herein.

Endorsement: United States circuit court of appeals for the fifth circuit. Wm. B. Dinsmore *et al.*, appellants, *vs.* L. N. Trammell *et al.*, individually and as the railroad commissioners of the State of Georgia, & The Southern Express Company, appellees. Citation in aid of cross-appeal of Wm. B. Dinsmore *et al.* Filed this 29th day of March, 1899. Geo. K. Calvin, deputy clerk.

Stipulation as to Record.

UNITED STATES OF AMERICA,
Southern District of Georgia, Northeastern Division.

WILLIAM B. DINSMORE ET AL.
vs.
SOUTHERN EXPRESS CO. ET AL.

In equity. Cross-appeal to U. S. circuit court of appeals for the fifth circuit.

It is hereby stipulated and agreed by and between the counsel for the respective parties as follows:

1. That the clerk of the circuit court of the U. S. for the northeastern division of the southern district of Georgia, shall make out and send forward but one transcript of the record. That the same shall be received and filed in the circuit court of appeals as
53 a compliance with the law and rules of the court as to both the original appeal of the railroad commission and the cross-appeal of the original complainants, the same to be used on the hearing for each and every purpose, as if separate and independent transcripts of the record had been certified and sent forward in aid of each appeal.

FRANK H. MILLER,
Sol'r for W. B. Dinsmore et al.
J. M. TERRELL,
Solc. for Railroad Commission and Att'y Gen'l.

United States circuit court of appeals. William B. Dinsmore *et al.*, appellants, *vs.* The Railroad Commissioners of Georgia.

Endorsement: United States circuit court of appeals. William B. Dinsmore *et al.*, appellants, *vs.* The Railroad Commissioners of Georgia and The Southern Express Company, appellees. Original stipulation between counsel that one record shall answer for the original & cross appeal. Filed in office March 31, 1899. Geo. K. Calvin, deputy clerk.

Order to Include Portion of Brief of Complainants' Solicitor in the Record.

In the Circuit Court of the United States for the Northeastern Division of the Southern District of Georgia.

WILLIAM B. DINSMORE ET AL.
vs.
SOUTHERN EXPRESS COMPANY ET AL. } In Equity. Bill, etc.

It is ordered by the court that for the correct understanding of its decision hereinbefore filed and from which the appeal is taken, that the clerk certify and send up with the record to the circuit

court of appeals that portion of the brief of Frank H. Miller, of counsel for complainant and solicitor of record, presented to the court on the hearing of this case, as follows:

The Revenue Act.

"If the construction of this law is involved in this case, against the commissioners, and we submit that it is not as the commission has no power to administer it, our contention being that the act
54 of the commission, in directing and requiring the Southern Express Company to pay the stamp tax imposed by the Federal Government was illegal, and the commission exceeded its lawful power—which *are* only to prescribe rates. It has only State authority, and cannot arrogate to itself to provide how and by whom the revenue taxes of the General Government be paid—still, if in the opinion of the court the construction of the law is involved, then we submit the following as the correct view of the statute."

It being true that upon this submission of complainants' counsel and solicitor aforesaid, the court held that the complainants did not ask a construction of the revenue act in question.

This April 6th, 1899.

EMORY SPEER, *U. S. Judge.*

Endorsement: U. S. circuit court, N. E. division, southern district of Ga. William B. Dinsmore *et al. vs.* The Southern Express Company *et al.* Order to include portion of brief of complainants' solicitor in the record. Filed this 7th day of April, 1899. Geo. K. Calvin, deputy clerk.

Certified Copy of Extract from Brief of Complainants' Solicitor.

In conformity to the provisions of the foregoing order of court the following extract from the brief of Frank H. Miller, of counsel for complainants and solicitor of record, presented to the court on the hearing of this case, is now set out in the record as follows:

The Revenue Act.

"If the construction of this law is involved in this case against the commissioners, and we submit that it is not as the commission has no power to administer it, our contention being that the act of the commission, in directing and requiring the Southern Express Company to pay the stamp tax imposed by the Federal Government was illegal, and the commission exceeded its lawful power, which is only to prescribe rates, it has only State authority, and cannot arrogate to itself to provide how and by whom the revenue taxes of the General Government be paid, still, if in the opinion of the court the construction of the law is involved, then we submit the following as the correct view of the Federal statute."

55 I, H. H. King, clerk of the circuit court of the United States for the southern district of Georgia, do hereby certify that the above extract from the brief of Frank H. Miller, of counsel

and solicitor of record, is a true copy of that portion of the original brief presented to the court on the hearing of the case. Witness my official hand and the seal of said court, this 7th, day of April. A. D., 1899.

[SEAL.] H. H. KING, *Clerk.*

Order Extending Time for Clerk to Make Out and Transmit the Record.

UNITED STATES OF AMERICA,
Southern District of Georgia, Northeastern Division.

WILLIAM B. DINSMORE ET AL.
vs.
THE SOUTHERN EXPRESS CO. ET AL. } In Equity.

It appearing to the court that Leander N. Trammell, Thomas C. Crenshaw, Jr., and Spencer R. Atkinson, individually, and as railroad commissioners of the State of Georgia, sued out an appeal in open court March 18th, 1899, to the decree of the court of March 7th, 1899; and that William B. Dinsmore and the other complainants sued out a cross-appeal in open court March 28th, 1899, to the said decree of the court of March 7th, 1899, which appeals were each of them perfected and citations having issued in aid of each appeal which have been duly and legally served upon all the parties to the record; and it appearing that owing to engagements of the clerk since the suing out of the appeals, his indisposition, and for other satisfactory cause, he has been unable to copy the record in the cause and transmit the transcript to the United States circuit court of appeals by the return days named in the citations.

It is now, on motion, in behalf of the said clark, and with the consent of the parties to the record, ordered that the time be enlarged and extended to 1st day May within which to make out and transmit the record. That this order be entered on the minutes of the court and copied in the transcript, and the original transmitted to the United States circuit court of appeals for the fifth circuit.

In open court, April 6, 1899.

EMORY SPEER,
U. S. Judge Who Signed the Citations upon Allowance of Appeal & Cross-appeal.

Endorsement: U. S. circuit court, N. E. division, southern district of Ga. Wm. B. Dinsmore *et al. vs.* The Southern Express Company *et al.* Order extending time for clerk to make out and transmit the record, &c. Filed this 7th day of April, 1899. Geo. K. Calvin, deputy clerk.

Clerk's Certificate.

I, H. H. King, clerk of the circuit court of the United States, for the southern district of Georgia, do hereby certify that the foregoing pages, numbered from page 1 to page 73, inclusive, hereto annexed, contain a true, correct and complete transcript of the record and

proceedings had in said court in the cause wherein William B. Dinsmore, *et al.*, are complainants, and The Southern Express Company, L. N. Trammell, *et al.*, railroad commissioners of the State of Georgia, are defendants, in equity, as the same remain on file and of record in my office.

In witness whereof I have hereunto set my hand and affixed the seal of my office, at Savannah, Georgia, this 13th day of April, in the year of our Lord one thousand eight hundred and ninety-nine, and of the Independence of the United States of America the one hundred and twenty-second.

[SEAL.] H. H. KING,
Clerk United States Circuit Court for the Southern District of Georgia.

57 (*Extract from Minutes.*)

United States Circuit Court of Appeals, Fifth Circuit, November Term, 1898.

TUESDAY, *May 9th*, 1899.

L. N. TRAMMELL ET AL.
vs.
WILLIAM B. DINSMORE ET AL.

WILLIAM B. DINSMORE ET AL.
vs.
SOUTHERN EXPRESS COMPANY, L. N. TRAMMELL, ET AL.

No. 820.

This cause was regularly called this day, and on agreement of counsel present was continued.

Application for Reassignment.

United States Circuit Court of Appeals, Fifth Circuit.

L. N. TRAMMELL ET AL., Railroad Commissioners of the State of Georgia, Appellants,
vs.
WILLIAM B. DINSMORE ET AL., Appellees.

WILLIAM B. DINSMORE ET AL., Cross-appellants,
vs.
SOUTHERN EXPRESS COMPANY, L. N. TRAMMELL, ET AL., Railroad Commissioners of the State of Georgia, Cross-appellees.

No. 820.

Appeal and cross-appeal from the U. S. circuit court, southern district of Georgia.

To the circuit court of appeals of the United States for the fifth circuit:

The undersigned, of counsel for the parties to the record in the above-stated case, respectfully recall to the attention of the court

that this cause, when called in its order May 9, 1899, was continued by unanimous request for the term, it being made known to the court that there was then pending in the Supreme Court of the United States a case which had been advanced under the
58 rules of that court, set for hearing October 16th, 1899, namely, *Crawford vs.* Hubbell, treasurer of the Adams Express Company, presenting issues which required a construction of the act of Congress under which the tax upon express receipts was assessed and imposed. The hearing of this case in the Supreme Court of the United States was *was* deferred to await a full bench, and was argued November 8th, 1899. No decision has yet been rendered, and as counsel are advised that the above-stated case is set down for hearing in this honorable court Wednesday, December 20th, 1899, counsel respectfully request at the hands of this court a reassignment of the above-stated case from December 20th, 1899, to such other day as will suit the pleasure of the court, allowing a sufficient interval to elapse for the Supreme Court of the United States to render its decision and for counsel to obtain a certified copy thereof.

Respectfully submitted.

J. M. TERRELL,
Sol'r for L. N. Trammell et al., Railroad Commissioners.
FRANK H. MILLER,
Solicitor for W. B. Dinsmore et al.
F. G. DU BIGNON,
Solicitor for Southern Express Company.

Endorsed: Application for reassignment of case. Filed December 15, 1899. J. M. McKee, clerk.

(*Extract from Minutes.*)

November Term, 1899.

WEDNESDAY, *December* 20, 1899.

L. N. TRAMMEL ET AL. *v.* and *adv.* WM. B. DINSMORE ET AL. } No. 820.

This cause was regularly called this day, and upon considering the motion of counsel filed herein, it is ordered that this cause be, and the same is hereby, continued.

58½ November Term, 1899.

WEDNESDAY, *May* 16, 1900.

(*Extract from Minutes.*)

L. N. TRAMMELL ET AL.
vs.
W. B. DINSMORE ET AL.

W. B. DINSMORE ET AL.
vs.
SOUTHERN EXPRESS COMPANY ET AL.

No. 820.

This cause was regularly called this day and submitted to the court after argument by Mr. J. M. Terrell, for the Railroad Commission of the State of Georgia, and by Mr. W. K. Miller, for W. B. Dinsmore *et als.*

59 November Term, 1899.

JUNE 1ST, 1900.

(*Extract from Minutes.*)

L. N. TRAMMELL ET AL., Railroad Commissioners of the State of Georgia,
vs.
WILLIAM B. DINSMORE ET AL.

WILLIAM B. DINSMORE ET AL.
vs.
SOUTHERN EXPRESS COMPANY ET AL.

No. 820.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the southern district of Georgia and was argued by counsel.

On consideration whereof it is now here ordered, adjudged, and decreed by this court that the decree of the said circuit court in this cause be, and the same is hereby, reversed, and that the suit be, and is hereby, dismissed at the costs of the complainants.

A true copy.
Attest:

[Seal United States Circuit Court of Appeals, Fifth Circuit.]

J. M. McKEE,
Clerk United States Circuit Court of Appeals for the Fifth Circuit.

60 United States Circuit Court of Appeals, Fifth Circuit, November Term, 1899.

Filed June 7th, 1900.

L. N. TRAMMELL ET AL., Railroad Commissioners of the State of Georgia, Appellants,
vs.
WILLIAM B. DINSMORE ET AL., Appellees.

WILLIAM B. DINSMORE ET AL., Cross-appellants,
vs.
THE SOUTHERN EXPRESS COMPANY, L. N. TRAMMELL, *et al.*, Railroad Commissioners of the State of Georgia, Cross-appellees.

No. 820.

Appeal and cross-appeal from the circuit court of the United — for the southern district of Georgia.

Before Pardee, McCormick, and Shelby, circuit judges.

The complainants, who are citizens of the State of New York, are shareholders in the Southern Express Company, a Georgia corporation, which has its principal office in the State of Georgia and conducts the business of an express carrier in that State and in ten of the neighboring States. The charging part of the bill in this suit avers substantially that the constitution of the State of Georgia, adopted December 21, 1877, expressly charges the legislature of that State with the duty to pass laws from time to time to regulate freight and passenger tariffs to prevent unjust discrimination on the various railroads of the State and to prohibit the same from charging other than just and reasonable rates and to enforce the same by adequate penalties; that, acting under this constitutional provision, the General Assembly of the State of Georgia passed an act on October 14, 1879, to carry the same into effect, the
61 *the* provisions of which act have been enlarged from time to time, and by an act approved October 21, 1891, the powers of the railroad commissioners were extended so as to give them authority to regulate charges for express companies for transportation from one point to another in the State of Georgia; that pursuant to this authority the railroad commissioners fixed and prescribed rules, tariffs, and classifications governing express companies plying between points within the State of Georgia and published and distributed their report of same, to which the bill refers; that from the date of the adoption of these measures the Southern Express Company conformed to the rules, orders, and tariffs so adopted by the railroad commission of Georgia, and were continuing to do so up to June 13, 1898, when the Congress of the United States passed the act commonly designated as the war-revenue act, by which it was made the duty of express companies on receiving a package for carriage to issue a receipt for such package, and providing that the receipt thus issued should bear a 1-cent stamp; that upon the taking effect of the war-revenue act, July 1, 1898, the Southern Express

Company asked and demanded the production by its customers of the stamp required to be attached under the provisions of the act at the issuing of its receipts or bills of lading, insisting that it should not carry any package or issue its receipt therefor until the sender or shipper furnished the necessary governmental stamp therefor; that certain citizens of Georgia refused to furnish these stamps or to pay for the same if furnished by the express company, and thereupon complained to the railroad commission of the State of Georgia, to wit, the respondents Leander N. Trammell, Thomas C. Crenshaw, and Spencer R. Atkinson, who, as such commission, on July 11, 1898, issued an order as follows:

"It being represented to the railroad commission of Georgia that the Southern Express Company, a corporation engaged as an express company in this State in the business of a common carrier of goods and merchandise for hire, since the passage by the Federal Congress of an act, approved June 13, 1898, entitled 'An act to provide ways and means to meet war expenditures, and for other purposes,' has exacted and continues to exact from shippers, as a condition precedent to forwarding any goods tendered to it for transportation between points within this State, the payment of a special tax upon such shipments imposed by said act, thus indirectly increasing the cost of transportation beyond the rate fixed therefor by this commission, it is

"Ordered that the Southern Express Company do appear
62 before this commission on the 18th day of July, 1898, then and there to show cause, if any it can, why it should not be held to have violated the rules and regulations of this commission by the exactions or overcharges, as aforesaid, and why suit should not be instituted against it in every case of such overcharges for the recovery of the penalty provided by law for such illegal act."

That the express company, in obedience to this order, appeared before the commission, and "cause was shown, respectfully denying all jurisdiction in the premises on the part of said commission, who on August 2, 1898, ordered and directed said stamp tax to be furnished, attached, cancelled, and paid by the Southern Express Company alone, and not by the shippers in whole or in part;" that on August 8th, 1898, the complainants duly requested the Southern Express Company and its directors and each of them in writing to omit and refuse to pay and to refrain from paying the said tax, and to test the constitutionality of the said action, and to refrain from voluntarily placing stamps upon its said receipts and cancelling the same before delivery, and to apply to a court of competent jurisdiction to determine the liability of the company under the said act, in the mode and manner as required by the said railroad commission; that on the same day (August 8, 1898) the board of directors replied to this request, stating that they deemed it inexpedient to comply with it on the ground that the failure to comply with the requirements of the order of the Georgia railroad commissioners of August 2, 1898, would subject the company to litigation with the authorities of the State of Georgia and the said railway commission, and the company would thereby run the risk of incurring penalties

under the laws of Georgia and of so clouding the title to its corporate franchise and rights as to embarrass its action.

It replied, further, that the company "will notify the railroad commission of Georgia that while respectfully protesting against the legality and validity of its order of August 2, 1898, the company will abide by and perform the same, and also that the company will file its application to said commission to be allowed to collect
63 from the shipper, in addition to the existing rates sanctioned by the commission, the amount of war-revenue tax held by the commission to be payable by the company, and in aid thereof will present to the commission a renewed request for the suspension of the order of August 2, 1898, until decision has been rendered on such application." On August 29, 1898, the board of directors notified the complainants that the railroad commission of Georgia had denied the application of the company to be allowed to collect from the shipper, in addition to the existing rates sanctioned by the commission, the amount of the war-revenue tax held by the commission to be payable by the company, and that the company was then observing the Georgia railroad commission's rates on intrastate business in Georgia, and was as to such business paying the amount of the war-revenue tax without charging the same to the shipper or endeavoring to collect the same from the shipper. Thereafter (October 27, 1898) the bill in this suit was filed, from which we make the following literal excerpts:

"And the complainants aver that there is no reason to believe that there can be and will be an increase of complainant's local and intrastate business; that the cost of conducting said business has been fixed by years of experience, and the amounts now paid therefor are the lowest that can be obtained and adopted and by which the public can be satisfactorily served by said express company; that the charges fixed by the said commissioners before the passage of the said revenue law were established so as to enable the company to live, operate, and pay a fair dividend or return to its owners for the money and property embarked in the said business, and that the order of the said commissioners requiring the payment by the said company of the said one-cent stamp on all bills of lading and receipts that it issued for the business done was resolved upon by the said commissioners illegally and arbitrarily and will cause a large reduction in the income of the company; that the enforcement of this order will be unfair, unjust, and unreasonable; that the rates of carriage now imposed require the said express company to carry many classes of freight at barely cost, and the expense incident to said service will in future be materially increased by the stamp aforesaid; that the payments for said stamps thus required to be made as a part of the rates imposed on the express company and under which it must do business by the order of said commission will result in irreparable damage and injury and will cause a diminution of income, as nearly as can be ascertained, of forty thousand dollars ($40,000) per annum and a loss to complainants in a decreased value of their shares of ten thousand dollars or other large sum.

* * * * * * *

"Your orators further shows that the said Southern Express Company and its directors, having declared their intention to do so, will now pay the said revenue tax out of the income and profits of the company and will thereby diminish the assets of the company and lessen the dividends thereon and the value of its shares, and will also pay the tax to the State on its gross income without any deductions therefrom of the revenue tax so imposed; that the voluntary compliance with the provisions of the said order of the railroad commission will expose the express company to a multiplicity of suits by and on behalf of its numerous shareholders, which will work irreparable injury to the business of the company and involve it in great and irreparable damage to your orators and of all the other shareholders.

64

* * * * * * *

"Your orators pray—

1. That it may be adjudged and decreed that the order of the railroad commission of the State of Georgia of August 2, 1898, requiring the Southern Express Company to pay the amount of the war revenue tax on business from one point to another in the State of Georgia without endeavoring to collect the same from the shippers or requiring them to make the payment thereof before the issuing of the said receipts or bills of lading *to* be without jurisdiction on the part of the said commission, unconstitutional, null, and void.

2. That the Southern Express Company, its officers and agents, be restrained from voluntarily complying with the provisions of the said order of the said railroad commission of August 2, 1898, and paying the said war revenue tax, as aforesaid.

3. That the attorney general of the State of Georgia be restrained from instituting any suit of any sort against the Southern Express Company for the purpose of enforcing the provisions of the said order of the said railroad commission of August 2, 1898.

4. That a writ of provisional and perpetual injunction of the same purport, tenor, and effect as hereinbefore set forth be granted to complainants.

5. That your orators may have such other and further relief in the premises as the nature of the case shall require and to a court of equity may seem meet."

The respondents submitted a general demurrer to the bill, assigning for cause thereof that it appeared by the bill and amendment that the complainants were not entitled to the relief prayed for, and that there was no equity in the bill and amendment, and for special cause of demurrer (besides others not necessary to state) showed that the court had no jurisdiction of the matters set forth in the complainants' bill to grant relief in the premises, "(*b*) because the acts complained of against these defendants, as set forth in said bill, are clearly within the jurisdiction and discretion of the railroad commission of Georgia under the constitution and laws of said State, and the courts have no jurisdiction to control said commission in such matters nor to restrain by injunction the exercise of such discretion, it not appearing from the allegations in said bill that there was any denial of the constitutional rights of complainants or of the

Southern Express Company or *of* any gross abuse of discretion; (c) because the power to prescribe just and reasonable rates is legislative and not judicial, and therefore the courts have no jurisdiction to inquire whether such power were well and properly exercised by the said commission; especially is this true on presentation of the facts as set out in complainants' bill."

65 The record shows that certain extracts from the 26th Annual Report of the Railroad Commission of Georgia for 1898, to which the bill had referred, were offered in evidence by the railroad commissioners and admitted, the extracts being tariff A, tariff B, tariff E, and rules from one to eleven, inclusive, applicable thereto. From the supplemental brief submitted in this court by counsel for the complainants (appellees and cross-appellants here) it appears that on the hearing in the circuit court "the commission stood upon its demurrer with its evidences of rates taken from their annual report to the executive of the State." From the original brief submitted by counsel for Dinsmore and others, the complainants, we learn—

"The order complained of is as follows:

"Office of the railroad commission of Georgia.

"ATLANTA, GA., *August* 2, 1898.

"*In re* complaint against the Southern Express Company for overcharge in demanding that shippers furnish revenue stamps to affix to bills of lading or receipts.

"On motion of Commissioner Crenshaw, it is ordered—

"That the report and opinion this day filed by Commissioner Atkinson, to whom the above-entitled matter was referred, be, and the same is hereby, adopted as the opinion and judgment of this commission.

"And it is further ordered that unless within five days from this date this commission is advised by the Southern Express Company that it has discontinued the practice of exacting from shippers the duty of furnishing the requisite revenue stamps to be attached to bills of lading or receipts as a condition precedent to receiving and forwarding goods tendered for shipment, that this commission will take such legal steps as may be necessary to enforce compliance with its rules and regulations.

"By order of the board:

"L. M. TRAMMELL, *Chairman.*

"J. D. MASSEY, *Secretary.*"

The foregoing order and the report and opinion of Commissioner Atkinson therein referred to are attached to the brief submitted by counsel for the railroad commission of Georgia. In that re-

66 port and opinion two questions are considered: (1) Does the act of the Federal Congress in question impose upon the express company the duty of furnishing the requisite revenue stamp to be affixed to the bill of lading required in the case of each consign-

ment to be issued by the carrier? (2) If so, is the refusal to accept and forward such goods except upon the condition that the shipper shall bear the burden of the carrying to the extent of providing such stamp in addition to the payment of the regular rate prescribed by this commission for the transportation of such goods a violation of the law which prohibits carriers from exacting a rate of transportation in excess of the maximum rate so prescribed?

The result of the consideration of the first question is thus expressed in the report: "The better conclusion is that when the Congress required carriers to issue a bill of lading to every shipper its purpose was to require the issue of such evidence of contract of affreightment as would enable the shipper to enforce the duty of carriers, and since affixing the stamp was necessary to the completion of such a bill of lading, the duty was by necessary implication imposed upon the carrier of furnishing and cancelling it."

In answer to the second question, namely, whether or not the exaction of the cost of a revenue stamp from a shipper amounts to a violation of the law which prohibits carriers from exacting a rate of transportation in excess of the maximum rate prescribed, and hence an extortion within the meaning of that term as employed in section 2187 of the Civil Code of Georgia, which provides: "If any railroad corporation organized or doing business in this State under any act of incorporation or general law of this State now in force, or which may hereafter be enacted, or any railroad corporation organized or which may hereafter be organized under the laws of any other State, and doing business in this State, shall charge, collect, demand or receive more than a fair and reasonable rate of toll or compensation for the transportation of passengers or freight of any description, or for the use and transportation of any railroad car upon its track, or any of its branches thereof, or upon
67 any railroad within this State which it has the right, license or permission to use, operate or control the same shall be guilty of extortion, and upon conviction thereof, shall be dealt with as hereinafter provided," the conclusion is reached that the Southern Express Company, "in refusing to accept for shipment goods tendered to it without the prepayment by the shipper of the revenue tax required by it to be affixed to its bill of lading, violates the provisions of the act hereinbefore referred to, and incurs the penalties which are therein prescribed."

The first prayer of the bill was granted, and a provisional injunction against the railroad commission was also granted. The second and third prayers were refused.

McCormick, circuit judge, after stating the case as above, delivered the opinion of the court:

Subject to the limitation that the carriage cannot be required without reward or upon conditions amounting to the taking of property for public use without just compensation, a State has power to prescribe the charges of public carriers for the carriage of persons and merchandise within its limits. The acts of the legislature of Georgia constituting the railroad commission and prescribing its

powers and duties do not violate the provisions of the Georgia constitution.

And the provisions of that constitution and of the statutes passed in pursuance thereof, administered subject to the limitation that the carriage cannot be required without reward, do not violate the Constitution of the United States and have full force as public law. Georgia Railroad Commission *v.* Smith, 70 Georgia, 694 (affirmed by the Supreme Court of the United States), 128 U. S., 174; Railroad Commission Cases, 116 U. S., 307–331; Reagan *v.* Farmers' Loan & Trust Company, 154 U. S., 362; Turnpike Company *v.* Sandford, 164 U. S., 578–598; Smith *v.* Ames, 169 U. S., 466–550; H. & T. C. Railroad *v.* Reagan, 90 Fed. Rep., 683.

The Southern Express Company, as to its business conducted between points within the State of Georgia, is bound to receive for carriage and to carry express matter properly tendered to it by any person for transportation, provided the person so tendering
68 such goods offers to pay its charges not to exceed the maximum rates fixed by the railroad commission so long as the body of the rates or the system of maximum charges prescribed by the commission are not unjust and unreasonable and such as to work a practical destruction to the rights of property of the shareholders in the corporation thus acting as a common carrier. The formation of a tariff of charges for the transportation by a common carrier of persons or property is a legislative or administrative rather than a judicial function. The courts are not authorized to revise or change the body of rates imposed by the commission. They do not determine whether one rate is preferable to another or what under all the circumstances would be fair and reasonable as between the carriers and the shippers. They do not engage in any mere administrative work. There can be no doubt of their power and duty to inquire whether a body of rates prescribed is unjust and unreasonable and such as to work a practical destruction to rights of property, and if found so to be to restrain its operation. Reagan *v.* Farmers' Loan & Trust Co., *supra*, p. 397. "While rates for the transportation of persons and property within the limits of a State are primarily for its determination, the question whether they are so unreasonably low as to deprive the carrier of its property without such compensation as the Constitution secures, and therefore without due process of law, cannot be so conclusively determined by the legislature of the State or by regulations adopted under its authority that the matter cannot be the subject of judicial inquiry." Smith *v.* Ames, 169 U. S., 526.

It seems clear to us from the statement of the case which we have digested from the record that the issue between the railroad commission of Georgia and the Southern Express Company was: Had that company the right to add to the maximum charges prescribed by the commission the cost of the one-cent. revenue stamp required by the act of Congress to be attached to a receipt issued in each case of shipment. As the act of Congress in question does not purport to fix or affect the rates which carriers may charge for transportation, its construction is not necessarily

involved in the solution of this issue. In the circuit court
69 counsel for the complainants submitted that the construction of the revenue act is not involved in this case, and the judge of that court who passed the decree from which this appeal is taken so held, and in the opinion which he delivered said: The issues presented by the pleadings do not render necessary a construction by the court of the act of Congress imposing the war stamp tax nor any clause of it. The shippers who refused to furnish the stamp or pay the cost of it did so on the ground that the demand thereof was an unlawful increase of the maximum rates prescribed by the commission. On this ground the complaint was made to the commission, and in its notice to the carrier the express company's action is referred to as "thus indirectly increasing the cost of transportation beyond the rate fixed therefor by the commission." When the carriers appeared before the commission in obedience to the notice it showed cause, etc., respectfully, as the bill avers, by "denying all jurisdiction in the premises on the part of the said commissioners." From which it is evident that the carrier relied on the act of Congress to support its action. Thus challenged, the commission proceeded to discuss and construe the act, and in effect held that it did not affect their power and duty to enforce the observance of the rates which they had prescribed. And later when the carrier, still protesting, applied for leave to increase its rates, the commission refused the leave and adhered to its judgment that the maximum rates which it had prescribed were just and reasonable and should be enforced. It is true, but wholly immaterial, that the commissioners held and expressed the view that the war revenue act imposes the tax in question exclusively upon the carrier and precludes it from relieving itself of the expense of affixing and cancelling the stamp required to be attached to each bill of lading, manifest, or other evidence of receipt, by passing that expense on to the shipper and requiring him to submit to an increased rate to that extent. This construction is unsound, but, as we have just said, it is wholly immaterial, for the act of Congress neither prohibits nor authorizes such an increase in rates. Neither expressly nor by implication does it contain
70 any provision on that subject (Crawford *v.* Hubbell and American Express Company *v.* Maynard, decisions by the Supreme Court, April 16, 1900). But the laws of Georgia and the requirements of the railroad commission in pursuance thereof and in accord therewith, while the limitations of the fourteenth amendment of the Constitution of the United States are observed, not only affect but control this carrier as to its Georgia business and prohibit it from increasing its charges beyond the maximum rates prescribed by the commission.

There is nothing in the bill in this case that tends to show that the tariffs of rates and classification and the rules prescribed by the commission and now sought to be enforced by it do not observe the limitations of the Constitution of the United States. The one substantive fact which the bill with reasonable accuracy states is that the payment of the tax imposed by the war-revenue law as required by the order of the railroad commission will aggregate to the South-

ern Express Company in the State of Georgia annually the sum of $42,000, which is repeated further on in this language: "That the payments for said stamps thus required to be made as a part of the rates imposed on the express company and under which it must do business by the order of said commission will result in irreparable damage and injury, and will cause a diminution of income as nearly as can be ascertained of forty thousand dollars per annum and a loss to complainants in a decreased value of their shares of ten thousand dollars;" and further on still the complainants again repeat and "show that the said Southern Express Company and its directors having declared their intention to do so will now pay the said revenue tax out of the income and profits of the company, and will thereby diminish the assets of the company and lessen the dividends thereof and the value of its shares." There is no statement whatever of the amount of income of the company from its Georgia business (intrastate business), nor from its business (interstate business), nor from both together, either gross income or net income or profits of the company. It is stated simply that the tax will aggregate in the State of Georgia annually the sum of $42,000, and that this will cause a diminution of the income—an obvious result as to the net income; but neither the substantive fact averred nor the obvious conclusion tends to show that the commission has hitherto trenched upon or is about to trench upon the limita-
71 tions of the Constitution, and thus present a case within the remedial jurisdiction of a court of equity. The aggregate amount in the State of Georgia annually of the war-revenue tax, as stated, namely, $42,000, shows the number of shipments by that carrier in that State (whether intrastate alone does not appear) of 4,200,000 annually. The argument of the pleader proceeds and shows that the express company has to make its own arrangements with the railroads for the carrying of its freight on passenger trains; that the contracts of the express company with the railroad companies are matters of negotiation, and the average charge of the railroads is fifty per cent. of the express companies' gross receipts; that it costs the express company forty-three per cent. of its receipts to do its business, and this added to the average of fifty per cent. which must be paid to the railroads makes the total cost to the express company ninety-three per cent. of its receipts; that considerable express business is done at a charge of 10 cents per package, and a very large proportion of its intrastate business is done at a charge of 25 cents per package. "Taking ninety-three per cent. from these charges and there is left a margin of seven-tenths of a cent on the 10-cent package and one and three-quarters of a cent on the 25-cent packages. If the express company is compelled to pay one cent each on the receipts it loses three-tenths of a cent on every 10-cent package, and makes only three-quarters of a cent on the 25-cent packages. This would materially reduce the very moderate profit of the business, and will so reduce the income of the company as to lessen any dividends payable to its shareholders like the complainants." The argument proceeds further that in section 9 of the act of the General Assembly of the State of Georgia approved

December 24, 1896 (Public Laws, 28), to levy and collect a tax for the support of the State government for the years 1897 and 1898, all persons and companies doing an express business and charging the public therefor in the State of Georgia were required to pay two and one-half per cent. on their gross receipts, and all persons or the superintendent of general agent of each express company were required to make a quarterly return under oath in the form therein prescribed under the penalty of indictment, conviction, and punishment, pursuant to section 1039
72 of volume 3 of the Code of 1895, and a failure to pay the tax will subject such corporation to a forfeiture of its charter. We notice this argument only to say that the "considerable express business done at a charge of 10 cents per package" is not affected by the action of the commission, because a reference to the tariffs prescribed by it, referred to in the bill and made a part of the record, shows that the lowest maximum rate prescribed therein is 25 cents, and the adding of one cent to the 10-cent rate would not make a rate in excess of that allowed by the commission's tariff. We suggest, further, that the argument shows no reason why the tax imposed by the Government of the United States should be added to the commission's rates that does not apply with at least equal force to the tax of two and one-half per cent. on their gross receipts which the State government is shown to have levied. We say with at least equal force; we think with greater force, because this last tax would adjust itself to the shipments uniformly, and one who shipped a small package or a package for a short distance at the rate of 10 cents would not be required to pay as much as one who shipped a larger package for a longer distance at the maximum rate shown in the commission's tariffs at $1.40 per hundred pounds. The increase made on this basis would be uniform and not unjustly discriminative between shippers, while the increase which the carrier proposes to make by adding the tax imposed by the war-revenue act does manifestly discriminate largely and unjustly between the shipper of a small package for a short distance at a low rate and the shipper of a larger package the longer distance at the larger rate. Though each shipper is charged one cent, the relation of this charge to the service is unequal. Further, it does not appear but that the fifty per cent. of the express company's gross receipts which the railroads impose upon it by negotiation, and which charge more largely diminishes the revenues of the express carrier, should not with equal justice and reason be added to the maximum rates prescribed by the commission. This is absurd and is suggested only to illustrate the utter want of force in the argumentative pleading which the bill attempts to put in the place of a showing of substantive facts.

It seems clear to us that the bill makes no case for the
73 interference of a court of equity to restrain the action of the railroad commission of Georgia, and that the demurrer, though some of its special grounds which we have not recited may have been not well taken, should have been sustained. This disposes of the appeal and of the cross-appeal.

It is therefore—

Ordered that the decree of the circuit court be, and the same is hereby, reversed, and that the suit be, and it is hereby, dismissed at the costs of the complainants.

74 United States Circuit Court of Appeals, Fifth Circuit, November Term, 1898.

Filed June 16*m*, 1900.

L. N. TRAMMELL ET AL., Railroad Commissioners of the State of Georgia, Appellants,
vs.
WILLIAM B. DINSMORE ET AL., Appellees.

WILLIAM B. DINSMORE ET AL., Cross-appellants,
vs.
SOUTHERN EXPRESS COMPANY, L. N. TRAMMELL, *et al.*, Railroad Commissioners of the State of Georgia, Cross-appellees.

No. 820.

Appeal and cross-appeal from the circuit court of the United States for the southern district of Georgia.

SHELBY, circuit judge, dissenting:

I respectfully dissent from the opinion of the court in this case. The opinion concludes with the proposition that the demurrer to the bill should have been sustained. No decree was rendered by the circuit court either overruling or sustaining the demurrer. It is true that errors are assigned predicated upon the failure of the circuit court to sustain the demurrer to the bill, but in advance of a decree on the demurrer no question, I think, is raised in that regard for review here. The court, after holding in the opinion that the demurrer should have been sustained, directs that the bill be dismissed. If the bill, on a hearing on the special demurrers, had been found deficient in its statement of facts it is usual and it would have been proper to allow amendment. The bill should not, I think, be dismissed by this court for defects in the statement of facts pointed out by special demurrers before the demurrers are decided by the circuit court.

The decree appealed from, rendered on March 7, 1899, is given in the foot-note. Judge Speer's opinion is reported in 92
75 Fed. Rep., 714. I think the decree is sustained by the authorities cited in the opinion, and that it should be affirmed.

The seventh paragraph of the bill shows the order made by the railroad commission and why it was made: "That certain citizens of Georgia refused to furnish the stamps to be attached to the receipts or bills of lading or to pay for the same if furnished by the express company, and thereupon complained to the railroad commission of the State of Georgia, to wit, the said Trammell, Crenshaw, and Atkinson, who on July 11, 1898, issued an order as fol-

lows: 'It being represented to the railroad commission of Georgia that the Southern Express Company, a corporation engaged as an express company within this State in the business of a common carrier of goods and merchandise for hire, since the passage by the Federal Congress of an act approved June 13, 1898, entitled "An act to provide ways and means to meet war expenditures, and for other purposes," has exacted and continues to exact from the shippers as a condition precedent to forwarding any goods tendered to it for transportation between points within this State the payment of a special tax upon such shipments imposed by said act, thus indirectly increasing the cost of transportation beyond the rate fixed therefor by this commission, it is ordered that the Southern Express Company do appear before this commission on the 18th day of July, 1898, then and there to show cause, if any it can, why it should not be held to have violated the rules and regulations of this commission by the exactions or overcharges as aforesaid, and why suit should not be instituted against it in every case of such overcharges for the recovery of the penalty provided by law for such illegal act.' Cause was shown respectfully denying all jurisdiction in the premises on the part of said commission, who on August 2, 1898, ordered and directed the said stamp tax to be furnished, attached, cancelled, and paid by the said Southern Express Company alone, and not by the shippers, in whole or in part."

The purport and effect of the order is to so construe the act of Congress of July 13, 1898, as to make it incumbent on the express company to pay the tax therein prescribed, and to hold that the express company cannot cast the burden of the tax on the
76 shipper without making the rates unreasonable and exceeding the rate of charges previously fixed by the railroad commission.

In the case of The American Express Company *v.* Maynard, attorney general of the State of Michigan, decided April 16, 1900, the Supreme Court holds that there is nothing in the act of Congress levying the tax that prevents the express company from adding the tax to the charges made by it.

The order was unquestionably made by the railroad commission on the theory that the act of Congress required the Southern Express Company to pay the tax, and that it forbade the company to shift the burden on the shipper. The Supreme Court in the case cited has not construed the act of Congress on the question as to who is required to pay the tax, but it has decided that, conceding that the act requires the express company to pay it, there is nothing in the act to prevent the company from casting the burden of the tax on the shipper. The rates charged by the express company were prescribed as reasonable by the railroad commission of Georgia. The complaint in the order of July 11, 1898, is that the express company has required the shippers to pay the special tax, 'thus indirectly increasing the cost of transportation beyond the rate therefor fixed by the commission." The authority conferred on the railroad commission is to fix reasonable rates. The order of the commission cannot be justified on the theory that the charges of the

express company, with the taxes added, are unreasonable. If the rate which the commission has fixed was reasonable, it certainly does not make it unreasonable to add to it the increased cost of transportation caused by the act of Congress. As the commission fixed the rate, the order complained of must have been made on the assumption that the act of Congress places the tax on the express company and deprives it of the right to shift the burden by contract.

In The American Express Company *v.* Maynard, *supra*, the Supreme Court said: "As there was no allegation that the rates existing prior to the imposition of the one-cent-stamp tax were unreasonable, it would follow that the rates which were otherwise reasonable were decided not to be so solely because there was added to the charge for each package the exact amount of the increased cost for transporting the package, occasioned as to each package by the specific imposition on each by the act of Congress of the one-cent-
77 stamp tax. But to cause rates which were conceded to be reasonable to become unreasonable because alone of such increased charge the assumption must be made that the act of Congress not only imposed the burden of the tax solely on the express company, but also forbade its shifting the same by any and every method."

The order of the railroad commission prescribes who shall pay the tax and who shall not pay it, and in effect prevents any contract between the shipper and the carrier in reference to the payment of the tax. This order is evidently based on an erroneous construction of the act of Congress. It is assumed by the commission that the act requires the express company to pay the tax, and forbids the express company from making any agreement which shifts the burden upon the shipper. A brief quotation from the case last cited will show the conclusion of the Supreme Court on this point: "A tax rests upon real estate. Can it be said that by the law imposing such a tax it was intended to prevent the owner of real property from taking into consideration the amount of a tax thereon in determining the rent which is to be exacted by him? A tax is imposed upon stock in trade. Must it be held that the purpose of such a law is to regulate the price at which the goods shall be sold and restrain the merchant, therefore, from distributing the sum of the tax in the price charged for his merchandise? As the means by which the burden of taxes may be shifted are as multiform and as various as is the power to contract itself, it follows that the argument relied on if adopted would control almost every conceivable form of contract and render them void if they had the result stated. Thus the price of all property, the result of all production, the sum of all wages, would be controlled irrevocably by a law levying taxes if such a law forbade a shifting of the burden of the tax and avoided all acts which brought about that result.

It cannot be doubted that to adopt by implication the view pressed upon us would be to virtually destroy all freedom of contract, and its final analyses would deny the existence of all rights of property."

The order made by the commission and enjoined by the circuit court cannot be held to be one fixing reasonable rates to be charged by the express company. The commission had already performed that duty. If, in view of changed conditions, the commission had made a new schedule of charges, and in doing so had not exceeded its authority, there would be no cause of complaint. But the order cannot be treated as one fixing a new schedule of charges. The one formerly fixed remains unchanged, and the present order in effect says to the express company, "You shall not require the shipper of packages to pay the one-cent tax. You shall not contract with him to secure its payment by him. You shall furnish, attach, and cancel the stamp. The shipper shall not do it in whole or in part." The order is one forbidding certain contracts prior to the shipment of the goods by the express company. The express company is to be subjected to the suits and penalties, not for violating any new schedule prescribed, but for the making of contracts which shift the burden of the tax. The railroad commission seeks to accomplish by its order what was done by the writ of mandamus by the State courts in Michigan; but the Supreme Court in reversing the decree of the supreme court of Michigan has, it seems to me, established a construction of the act of Congress in direct conflict with the theory on which the railroad commission of Georgia acted. American Express Company *v.* Maynard, *supra*.

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I think that the circuit court was right in holding that the "railroad commission had no jurisdiction to adjudge and designate the party who shall pay the tax." The order made by the commission requires "the stamp tax to be furnished, attached, cancelled, and paid by the Southern Express Company alone and not by the shippers in whole or in part." In effect, the command is that the express company shall pay it and that the shipper shall pay no part of it, and that the shipper and the carrier shall not be permitted to make any contract for its payment in whole or in part by the shipper.

I concur in the views expressed by the court that a State has power to prescribe the charges of public carriers for the carriage within the State of persons and merchandise. This power is, of course, subject to the limitation that the carriage cannot be required without reward or upon conditions amounting to the taking of property for public use without just compensation. I do not deny or question the right of the State to tax, control, and regulate, subject to constitutional limitations, any business carried on by corporations or individuals within its limits. Conceding all this, where does the commission get the right to say who shall and who shall not pay a Federal tax? It is the theory of our system of government that the State and the nation alike are to exercise their powers respectively, each without hindrance from the other. This theory, by necessary implication, excludes wholly any interference by either with an independent exercise by the other of its constitutional powers. Cooley on Taxation (2nd ed.), 83. The State tribunals must in proper cases construe Federal laws, subject to the final decision of the Supreme

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Court, but neither the legislature of a State nor a commission created by it has authority to make laws or orders directing who shall or shall not pay a tax constitutionally levied by the United States. Surely such orders cannot be valid in cases where they would tend to embarrass the Government in the collection of the tax. The order in question does not purport to be one regulating the charges to be made by the express company. It is, in terms, one laying down a rule as to who shall and who shall not pay a stamp tax to the United States. It is applicable to all packages, whether or not the stamp, if treated as an additional charge, makes the whole charge exceed the rates previously fixed by the commission. The order, it seems to me, not only embodies an erroneous construction of the revenue law, but its enforcement may materially interfere with the collection of the tax. The question of the taxing powers of the States as their exercise has affected the functions of the Federal Government has often been considered by the Supreme Court, and the right of the States to impede or embarrass the constitutional operations of the General Government or the rights of its citizens by levying taxes has been always denied. Crandall *v.* State of Nevada, 6 Wall., 35. If the States can interfere by prescribing regulations as to the collection of the revenues of the Federal Government and can say who shall and who shall not pay a prescribed tax and forbid contracts between citizens in reference to it which are permissible under the statute creating the tax, then the States have the right and power to embarrass and impede at a vital point the operations of
80 the General Government. The same policy and law which forbids the States to tax the instrumentalities of the Federal Government should deprive them of the power to embarrass, prevent, or regulate the collection of revenues levied under its constitutional powers.

The Supreme Court has said on two occasions, Chief Justice Marshall delivering the opinions, that "the States have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the General Government." M'Culloh *v.* The State of Maryland, 4 Wheat., 316; Weston *v.* The City Council of Charleston, 2 Pet., 449.

Is it not clear that the order of the railroad commission seeks "to control the operation" of the law enacted by Congress? It pointedly says who shall and who shall not pay the tax levied by the act. It forbids lawful contracts on the subject. It impedes the collection of the tax by saying that it shall not be paid by certain persons who otherwise might pay it.

If the State can create a commission to make the order in question, has it not equal authority to regulate by statutes and commissions the attaching, canceling, and furnishing of the stamps on checks, conveyances, leases, and other instruments, and on patent medicines, matches, and other articles taxed by the statute? If the administration of the United States revenue laws is subject to State supervision, is there any reason why the post-offices within the State and the stamps there used should escape the same jurisdiction?

If for some reason not apparent to me it be true that the commission may control and regulate the payment of the tax, it must be done within legal restrictions. The commission cannot be permitted to make orders construing the Federal statute which in effect deprive the express company of its property without due process of law or which forces it to carry without compensation. In other words, when the commission fixes rates by regulating Federal taxation it must keep within the same limits that would govern if it sought to perform its functions by direct action. The bill in this case
81 shows that reasonable rates had been previously fixed. It shows that the subsequent order complained of will cause loss to the express company of $42,000 annually on its business in Georgia—that is, that the express company must do business receiving $42,000 less each year than it would receive if paid at the reasonable rates fixed by the commission. The bill also shows that, applying the last order of the commission to the rates now charged by the express company, some of which are below the schedule of the commission, part of the express company's business will be done at an actual loss. The demurrers, if we are to consider them before a decree on them by the circuit court, admit the averments of the bill. These averments, I think, are sufficient to sustain and authorize the preliminary injunction. I am of opinion, therefore, that the bill should not be dismissed.

82 *Foot-note.*

In the Circuit Court of the United States for the Northeastern Division of the Southern District of Georgia.

WILLIAM B. DINSMORE ET AL.	In Equity. Bill, etc.
vs.	Application for Injunction, etc.
THE SOUTHERN EXPRESS COMPANY ET AL.	

The above-stated cause having been duly assigned for hearing on the application for temporary injunction, at Augusta, in said district, on the 10th day of February, 1899, and the parties having been fully heard on the bill and the demurrer thereto, and the court having taken time for advisement—

It is now, upon consideration, ordered, adjudged, and decreed that the prayer that the Southern Express Company be enjoined from voluntarily paying the war-stamp tax in question be, and the same is hereby, denied; ordered, adjudged, and decreed, further, that the defendants The Railroad Commission of Georgia and each member thereof, to wit, the individual defendants Leander N. Trammell, Thomas C. Grenshaw, Jr., and Spencer R. Atkinson, be, and the same are hereby, enjoined from any and all order, direction, action, or legal steps instituting or tending to institute and from any and all proceedings for the recovery of the penalties named in the statute of Georgia in that behalf to enforce compliance with its said order against the Southern Express Company, its officers or agents, as threatened in the order of said commission dated August 2, 1898,

for the reason that said order is null and void and said commission has no jurisdiction to adjudge and designate the party who shall pay said tax.

Ordered, further, that the cause proceed as usual in equity.

March 7th, 1899.

EMORY SPEER,
U. S. Judge.

83 *Certificate.*

I, J. M. McKee, clerk of the United States circuit court of appeals for the fifth judicial circuit, do hereby certify that the foregoing 83 pages, numbered from *a* to 82, inclusive, contain a true, full, and perfect transcript of the record and all proceedings had, including the opinions of the court, in the case of L. N. Trammell *et al.*, railroad commissioners of the State of Georgia, appellants, *vs.* William B. Dinsmore *et al.*, appellees; W. B. Dinsmore *et al.*, cross-appellants; The Southern Express Company, L. N. Trammell *et al.*, railroad commissioners of the State of Georgia, cross-appellees, as fully and completely as the same now remains of record and on file in my office.

Seal United States Circuit Court of Appeals, Fifth Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States circuit court of appeals, at the city of New Orleans, on this the 16 day of July, A. D. 1900.

J. M. McKEE,
Clerk of the U. S. Circuit Court of Appeals, Fifth Circuit.

Endorsed on cover: File No., 17,875. U. S. circuit court appeals, 5th circuit. Term No., 390. William B. Dinsmore and C. Gray Dinsmore, and William B. Dinsmore, C. Gray Dinsmore, and Dumont Clarke, as executors and trustees under the will of William B. Dinsmore, deceased, petitioners, *vs.* The Southern Express Company, L. N. Trammell, Thomas C. Crenshaw, Jr., and Spencer R. Atkinson, composing the railroad commission of the State of Georgia, *et al.* Filed August 16th, 1900.

84 Supreme Court of the United States, October Term, 1900.

WILLIAM B. DINSMORE and C. GRAY DINSMORE and William B. Dinsmore, C. Gray Dinsmore, and Dumont Clarke, as Executors and Trustees under the Will of William B. Dinsmore, Deceased, Petitioners,

vs.

THE SOUTHERN EXPRESS COMPANY; L. N. TRAMMELL, Thomas C. Crenshaw, Jr., and Spencer R. Atkinson, Composing the Railroad Commission of the State of Georgia, *et al.*

No. 390.

On petition for writ of certiorari to the United States circuit court of appeals for the fifth circuit.

Writ of certiorari having issued October 23, 1900, directed to the judges of the United States circuit court of appeals for the fifth circuit under and pursuant to the above-stated petition; and it appearing that there was filed with the petition for certiorari August 16th, 1900, a transcript of the record and proceedings in the said cause in the circuit court of appeals for the fifth circuit, it is hereby stipulated and agreed between the counsel of the respective parties, that the transcript so of file may be taken as a return to the writ of certiorari, and the clerk of the circuit court of appeals for

85 the fifth circuit, upon filing hereof in that court, may transmit and send up with his return to the writ of certiorari a certified copy of this stipulation, the same to stand in place of and in lieu of a separate and independent original transcript of the record and proceedings so of file in the Supreme Court of the United States, and to stand and be treated as if made in response to said writ of certiorari.

Oct. 27, 1900.

(Signed) FRANK H. MILLER,
Solicitor for William B. Dinsmore and C. Gray Dinsmore and William B. Dinsmore, C. Gray Dinsmore, and Dumont Clarke, as Executors and Trustees under the Will of William B. Dinsmore, Deceased.

(Signed) JOSEPH M. TERRELL,
Solicitor for L. N. Trammell, Thomas C. Crenshaw, Jr., and Spencer R. Atkinson, Composing the Railroad Commission of the State of Georgia.

(Signed) FLEMING G. DU BIGNON,
Solicitor for the Southern Express Company.

(Endorsed:) Filed October 31, 1900. J. M. McKee, clerk.

86 United States Circuit Court of Appeals for the Fifth Circuit.

I, J. M. McKee, clerk of the United States circuit court of appeals for the fifth circuit, do hereby certify that the foregoing two pages, numbered from one to two, inclusive, contain a true copy of the

agreement of counsel in reference to return to writ of certiorari in the case of Wm. B. Dinsmore *et al. vs.* The Southern Express Company *et al.*, No. 820, as the same remains upon the files and records of said United States circuit court of appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States circuit court of appeals, at the city of New Orleans, this first day of November A. D. 1900.

[Seal United States Circuit Court of Appeals, Fifth Circuit.]

J. M. McKEE,
Clerk of the United States Circuit Court of Appeals for the Fifth Circuit.

87 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the United States circuit court of appeals for the fifth circuit, Greeting:

[Seal of the Supreme Court of the United States.]

Being informed that there is now pending before you a suit in which L. N. Trammell, Thomas C. Crenshaw, Jr., and Spencer R. Atkinson, composing the railroad commission of the State of Georgia, are appellants, and William B. Dinsmore and C. Gray Dinsmore, and William B. Dinsmore and C. Gray Dinsmore and Dumont Clarke as executors and trustees under the will of William B. Dinsmore, deceased, are appellees, and William B. Dinsmore and C. Gray Dinsmore, and William B. Dinsmore, C. Gray Dinsmore and Dumont Clarke, as executors and trustees under the will of William B. Dinsmore, deceased, are appellants and The Southern Express Company *et al.*, are appellees, which suit was removed into the said circuit court of appeals by virtue of appeals from the circuit court of the United States for the southern district of Georgia, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said circuit court of appeals and removed into the Supreme Court of the United
88 States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 23d day of October, in the year of our Lord one thousand nine hundred.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

89 UNITED STATES OF AMERICA, }
Fifth Judicial Circuit. }

The within writ received October 31, 1900. For return thereto I, J. M. McKee clerk of the United States circuit court of appeals for the fifth circuit, by direction of the judges of said court, and in accordance with the written stipulation of the parties filed in said

cause, a certified copy of which is attached hereto and made a part of this return, do hereby certify that the record now on file in the office of the clerk of the Supreme Court of the United States in the cause named in the within writ is a true, full and correct transcript of the record of said cause in said circuit court of appeals, as the same now remains on file and of record in my office.

Given under my hand and the seal of said court hereto affixed at the city of New Orleans, this the first day of November, A. D. 1900.

[Seal United States Circuit Court of Appeals, Fifth Circuit.]

J. M. McKEE,
Clerk of the United States Circuit Court of Appeals for the Fifth Circuit.

[Endorsed:] File No. 17875. Supreme Court of the United States. No. 136, October term, 1901. Wm. B. Dinsmore *et al.*, *vs.* The Southern Express Co. *et al.* Writ of certiorari and return. Filed Nov. 9, 1900.